Supreme Court, U.S.
FILED

No. 06-1283 MAR 16 2007
OFFICE OF THE CLERK

In the Supreme Court of the United States

KENNETH RAY ATKINSON,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

ROBERT N. UDASHEN
Counsel of Record
SORRELS, UDASHEN & ANTON
2301 CEDAR SPRINGS ROAD
SUITE 400
DALLAS, TX 75201
(214) 468-8100
(214) 468-8104 FAX

Counsel for Petitioner

March 16, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether the decision of the Texas Court of Criminal Appeals denying Kenneth Ray Atkinson's application for a writ of habeas corpus conflicts with and is in direct disregard of the decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)?

PARTIES TO PROCEEDINGS

Kenneth Ray Atkinson - Petitioner
represented by
Robert N. Udashen
Sorrels, Udashen & Anton
2301 Cedar Springs Road
Suite 400
Dallas, Texas 75201
214-468-8100

The State of Texas - Respondent
represented by
Craig Watkins
District Attorney
Frank Crowley Courts Bldg.
133 N. Industrial Blvd., L.B. 19
Dallas, Texas 75207

and

Greg Abbott
Attorney General of Texas
P. O. Box 12548
Austin, Texas 78711-2548

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Petitioner, KENNETH RAY ATKINSON, petitions for a writ of certiorari to review the decision of the Court of Criminal Appeals of Texas entered December 21, 2006, denying Atkinson's request for relief pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.07 from his conviction for injury to a child. A motion for rehearing was filed with the Court of Criminal Appeals on January 4, 2007. The Court of Criminal Appeals entered an order on January 11, 2007, refusing to entertain that motion.

OPINION BELOW

The decision of the Court of Criminal Appeals of Texas is dated December 21, 2006 and is styled *Ex parte Kenneth Ray Atkinson*. The cause number is WR-65,444-01. The decision is unpublished. A copy of the decision is attached in Appendix A. The decision is based on Findings of Fact and Conclusions of Law on Application for Writ of Habeas Corpus entered by the trial court. A copy of those Findings is in Appendix B. A motion for rehearing was filed in the Court of Criminal Appeals on January 4, 2007. That motion was refused on January 11, 2007. A copy of the refusal is in Appendix C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI, United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.

Amendment XIV, United States Constitution

Section 1. . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Procedural History

Petitioner, Kenneth Ray Atkinson, was accused by indictment in Dallas County, Texas with the offense of injury to a child. Atkinson entered a plea of "not guilty" to the indictment and proceeded to trial before a jury. The jury found Atkinson guilty as charged. Then, following a punishment hearing, the jury assessed Atkinson's punishment at confinement in the Institutions Division of the Texas Department of Criminal Justice for life. The trial court sentenced Atkinson in accordance with the jury's verdict.

Atkinson gave timely notice of appeal. On February 6, 2004, the Court of Appeals for the Fifth District of Texas at Dallas affirmed Atkinson's conviction. *Atkinson v. State*, No. 05-03-00199-CR (Tex. App. - Dallas 2004) (unpublished). A copy of that opinion is attached in Appendix D. Atkinson did not file a motion for rehearing in the Court of Appeals nor did Atkinson file a petition for discretionary review in the Court of Criminal Appeals of Texas.

On June 15, 2005, Applicant filed an application for a writ of habeas corpus pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.07 in which he asked that his conviction and sentence be set aside because he did not receive effective assistance of counsel. On December 21, 2006, based on

Findings made by the trial court, the Court of Criminal Appeals of Texas denied the relief requested by Atkinson. (See Appendix A and Appendix B). The Court of Criminal Appeals refused a motion for rehearing on January 11, 2007.

Factual Background

On June 11, 2001, Jeanie Rivers went to Kenneth Ray Atkinson's home at the Quill Run Mobile Home Park in Hutchins, Texas, to use the telephone. Atkinson informed Rivers that his wife, Barbara, had been away for a week and that he did not know if she was coming home. Atkinson told Rivers he trusted her and was going to show her something. He walked Rivers into the bedroom. Rivers watched as Atkinson pulled a box away from a closet and removed some clothes that were hanging on the door knob. Atkinson then opened the door and Rivers saw a little girl, sitting naked in the closet. She was very thin and dirty. Rivers reported what she saw to her husband, Joe, who notified the police. The girl, Lauren Calhoun, was removed from the home. Atkinson and his wife were subsequently arrested and charged with injury to a child.

REASONS FOR GRANTING THE PETITION

Kenneth Ray Atkinson filed an application for a writ of habeas corpus in the state trial court pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.07. In that application, Atkinson asserted that his trial attorneys did not provide him with effective assistance of counsel. Atkinson pointed out that his trial attorneys violated the principles of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) by committing several errors in the course of their representation of Atkinson that were not the result of

reasonable professional judgment and were outside the wide range of professional, competent assistance.

An evidentiary hearing was held in the state trial court on Atkinson's application. Atkinson presented extensive testimony at that hearing about the errors committed by his attorneys. One of Atkinson's trial attorneys testified at the hearing that she and her co-counsel were ineffective in their representation of Atkinson.[1] She testified that the mistakes they made during Atkinson's trial were not the result of any reasonable trial strategy. She also said that the mistakes she and her co-counsel made prejudiced Atkinson. (TR[2]: 54-90).

The trial court entered findings of fact and conclusions of law following the evidentiary hearing. The trial court acknowledged the testimony by Atkinson's trial attorney but did not discuss the specifics of the testimony. Nor did the trial court discuss the specific issues raised in Atkinson's application. Instead, the trial court entered general, conclusory findings such as Atkinson was "not denied his right to effective assistance of counsel;" Atkinson did not "state sufficient facts upon which relief could be granted;" Atkinson "failed to present this Court with any constitutional question or questions which would entitle Applicant to relief at this time;" and Atkinson "has not been denied any rights guaranteed to him by the Constitution of the United States or the Constitution of the State of Texas." (See, Appendix B). Atkinson objected to the findings entered by the trial court. (See Appendix E). The Court of Criminal Appeals of Texas,

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[1] Applicant's other trial attorney suffered a stroke before the hearing and was unable to testify.

[2] TR refers to the transcript of the evidentiary hearing.

however, denied Atkinson relief based on the conclusory findings by the trial court. The Court of Criminal Appeals did not discuss Atkinson's allegations nor did the Court of Criminal Appeals require the trial court to enter specific findings addressing Atkinson's claims.

The Trial Attorneys's Errors

In the application he filed in the state trial court, Atkinson pointed out numerous errors committed by his trial attorneys. The most important of those are discussed below.

The state presented "expert" testimony from Allisandra Mahoney, a play therapist, and from Dr. Barbara Rila, a psychologist, during the guilt-innocence phase of Atkinson's trial. The testimony from these witnesses was offered in support of the state's claims that Atkinson caused serious bodily injury or serious mental deficiency or impairment to Lauren Calhoun. Atkinson's trial attorneys did not object to the testimony of either of these witnesses even though the testimony was objectionable on several grounds.

Before expert testimony may be admitted into evidence pursuant to TEX. R. EVID. 702, the proponent of the evidence "must persuade the trial court, by clear and convincing evidence, that the evidence is reliable and therefore relevant." *Hartman v. State*, 946 S.W.2d 60, 62-63 (Tex. Crim. App. 1997); *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992). The reliability of "soft science" evidence such as the testimony from Rila and Mahoney may be established by showing that (1) the field of expertise involved is a legitimate one, (2) the subject matter of the expert's testimony is within the scope of that field, and (3) the expert's testimony properly relies upon or utilizes the principles involved in that field. *Nenno v. State*, 970 S.W.2d

549, 561 (Tex. Crim. App. 1998), overruled on other grounds by *State v. Terrazas*, 4 S.W.3d 720, 727 (Tex. Crim. App. 1999).

Dr. Mark Cunningham, a board certified forensic psychologist, reviewed the testimony offered by Mahoney and Rila and found that testimony to be unreliable in a number of ways. An affidavit from Dr. Cunningham was attached to Atkinson's application and Dr. Cunningham testified at the evidentiary hearing in the state trial court. (A copy of Dr. Cunningham's affidavit is in Appendix F). In his affidavit and testimony, Dr. Cunningham states that Mahoney "relied on a methodology that is widely viewed as inappropriate and unreliable [play therapy] in determining the factual reality of a child's experience of physical/sexual abuse or other victimization." Dr. Cunningham also points out that it was inappropriate for Mahoney to use the therapeutic relationship, in which she was involved with Lauren Calhoun, as a basis for evaluating the factual realities of Lauren Calhoun's maltreatment. Dr. Cunningham notes that Mahoney's participation in Atkinson's trial as Lauren Calhoun's therapist and as a forensic evaluator is a practice that "has been subjected to and rejected by peer-review in scholarly journals, scholarly text, and professional associations." (Emphasis in original).

Mahoney was allowed to testify, without objection, that play therapy is a reliable method or process in which children act "out things that have happened to them in their life." (RR[3] 5: 150). Mahoney described how "Kenny" [Atkinson] apparently hurt Lauren Calhoun and sexually assaulted Calhoun. (RR 5: 155-156). Mahoney explicitly described

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[3] RR refers to the reporter's record from Applicant's trial.

how Calhoun spread the legs of a doll representing her and how "Kenny" poked the doll between the legs until it hurt. (RR 5: 155-156). Mahoney even went so far as to describe "Kenny" burning Calhoun's vaginal area. (RR 5: 158). Mahoney also talked about how Calhoun "play[ed] out the closet scene." (RR 5: 160). Mahoney explained to the jury it was "Kenny" who put Calhoun in the closet. (RR 5: 161). Mahoney concluded that Atkinson and his wife did "horrible" things to Calhoun. (RR 5: 167). Mahoney divined the things about which she testified from her play therapy sessions with Calhoun.

Turning to Dr. Rila's testimony, Dr. Cunningham points out that Rila ignored her ethical obligation to acknowledge the limitations of her opinion. For example, she did not caution the jury about the danger of relying on Calhoun's memory of her maltreatment. Instead, Rila simply opined for the jury that Calhoun recalled how she was neglected and assaulted, physically and sexually. (RR 5: 192-193). The jury was led to believe that Calhoun's rendition of events was factually accurate and Rila used reliably widely accepted methods to form her opinions. (RR 5: 189, 194-195).

Dr. Cunningham notes different areas in which Rila's testimony lacks any reliable scientific basis. One such area is where Rila testified that because Calhoun achieved normal developmental milestones up to the age of eight months she would have developed normally had it not been for the abuse and neglect she suffered. (RR 5: 199). Another area where Rila's testimony was not based on reliable science was when Rila testified that if one parent is abused by the other parent, the abused parent is likely to inflict harm on the children. (RR 5: 211-212). In fact, as Dr. Cunningham explains, the opposite is true; the abusive parent is more likely to abuse the children than the abused parent. Yet another is Rila's use of

various psychological tests in evaluating Calhoun. Dr. Cunningham establishes that there are no reliable norms for interpreting the tests used by Rila in connection with a child like Calhoun.

Atkinson's trial attorneys should have objected to the reliability of Rila's opinion that Calhoun suffered serious mental deficiency and impairment and likely will for a life time because of neglect and trauma. They should have objected to the opinion that her IQ will never be what it would have been. They should have objected to Rila's opinions that Calhoun will experience impaired emotional functioning, difficulty with relationships, an impaired sense of normality, low self esteem, etc.

In addition to not objecting to the state's so-called "expert" testimony, Atkinson's trial attorneys did not object to testimony about an extraneous offense allegedly committed by Atkinson, did not object to hearsay testimony offered by the state, did not object to speculative testimony offered by the state, did not object to admission into evidence of improperly obtained oral and written statements made by Atkinson, and did not lay the proper predicate for introduction into evidence of expert psychological testimony that Atkinson acted under duress.

Maridell Templeton, one of Atkinson's trial attorneys, testified that there was no trial strategy basis for the failures of Atkinson's trial attorneys outlined above. Those failures resulted in the admission of extremely prejudicial evidence at Atkinson's trial. For example, both Mahoney and Rila provided unreliable testimony about the horrible consequences suffered by Calhoun due to the abuse allegedly inflicted on her. In addition, both witnesses testified about Calhoun being sexually assaulted by Atkinson. The sexual assault testimony

constituted an extraneous offense. There can be no more prejudicial testimony than the accusation of sexual assault of a child. That testimony undoubtedly influenced the jury to both find Atkinson guilty and impose a maximum punishment on Atkinson.

The overall lack of effectiveness of Applicant's trial attorneys completely undermines confidence in the outcome of Atkinson's trial.

The Legal Standard

The right to the assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. The right to the assistance of counsel has long been understood to include a "right to the effective assistance of counsel." *See, McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970). The integrity of our criminal justice system and the fairness of the adversary criminal process is assured only if an accused is represented by an effective attorney. *See, United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 667, 66 L.Ed.2d 564 (1981). Absent the effective assistance of counsel, "a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 335, 343, 100 S.Ct. 1708, 1715, 64 L.Ed.2d 333 (1980). Thus, a defendant is constitutionally entitled to have effective counsel acting in the role of an advocate. *See, Anders v. California*, 386 U.S. 738, 743, 87 S.Ct. 1396, 1399, 18 L.Ed.2d 493 (1967).

This Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) established the federal standard for determining whether an attorney rendered reasonably effective assistance of counsel. Pursuant to that test

> . . . the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2064.

Once a convicted defendant establishes that his attorney's actions were objectively unreasonable, he must then "show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different." *Strickland v. Washington*, 466 U.S. at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068.

CONCLUSION

The Court of Criminal Appeals of Texas completely ignored the holding of *Strickland v. Washington*, *supra*, in reviewing Atkinson's application for a writ of habeas corpus. In denying Atkinson's application for a writ of habeas corpus, the Court of Criminal Appeals of Texas relied on findings made by the state trial court that determined, in a conclusory manner, that Atkinson received effective assistance of counsel at his trial. The trial court's findings are unsupported by the record. The trial court does not even address the testimony of Maridell Templeton, one of Atkinson's trial attorneys, that there was no objectively reasonable trial strategy basis for the

several unprofessional mistakes made by Atkinson's trial attorneys. The trial court did not discuss the specific mistakes made by Atkinson's trial attorneys nor did the trial court discuss the prejudice to Applicant from those mistakes. In other words, the trial court did not analyze Atkinson's claims pursuant to the holding of *Strickland*. By adopting the findings of the trial court, the Court of Criminal Appeals approved a review of Atkinson's claims that was contrary to the holding of *Strickland v. Washington, supra*.

The lack of any specific discussion of any of the issues raised by Atkinson can only mean that there is no spin that can be put on the failures of Atkinson's trial attorneys to make them appear reasonably competent. The mistakes made by Atkinson's trial attorneys, and identified by Atkinson in his pleadings and at the evidentiary hearing on his writ application undermine confidence in both the verdict finding Atkinson guilty and the assessment of Atkinson's punishment. Atkinson deserves a fair review of those claims. He did not get that.

The time to file a petition for a writ of habeas corpus in federal court challenging Atkinson's conviction has expired. This Court is thus Atkinson's last hope. This Court should not allow the Court of Criminal Appeals of Texas to affirm Atkinson's conviction by ignoring the holding of *Strickland v. Washington, supra*. A faithful application of *Strickland* to the facts of this case would reveal that Atkinson did not receive effective assistance of counsel at his trial. The Court of Criminal Appeals should be required to apply the holding of *Strickland v. Washington, supra* to the facts of Atkinson's case.

FOR THE ABOVE REASONS, Petitioner, Kenneth Ray Atkinson, respectfully asks that this Court grant this Petition

and then reverse the judgment of the Court of Criminal Appeals of Texas.

Respectfully submitted,

ROBERT N. UDASHEN, P.C.
Counsel of Record
Bar Card No. 20369600
SORRELS, UDASHEN & ANTON
2301 Cedar Springs Road
Suite 400
Dallas, Texas 75201
214-468-8100
214-468-8104 fax

Attorney for Petitioner

APPENDIX

APPENDIX A

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

RE: Writ No. WR-65, 444-01
STYLE: ATKINSON, KENNETH RAY
TRIAL CT. NO: W01-33777-I(A)
12/20/06

This is to advise that the Court has denied without written order on the findings of the trial court after hearing the application for writ of habeas corpus.

Louise Pearson, Clerk

Robert Udashen
2301 Cedar Springs Road,
Suite 400
Dallas, TX 75201

APPENDIX B

IN THE CRIMINAL DISTRICT COURT NO. 2 OF DALLAS COUNTY, TEXAS

WRIT NO. W01-33777-I(A)

[Filed July 3, 2006]

EX PARTE	)
	)
KENNETH RAY ATKINSON	)
	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON APPLICATION FOR WRIT OF HABEAS CORPUS

The Court, having considered the allegations contained in Applicant's Application for Writ of Habeas Corpus in the above numbered and entitled cause, makes the following Findings of Fact and Conclusions of Law:

HISTORY OF THE CASE

Applicant was convicted by a jury on a plea of not guilty for the offense of Injury to a Child, 14 Years or Younger and was sentenced to a Life term in, prison on December 12, 2002, in Cause No. F01-33777-HI. After conviction an appeal was perfected in this cause. Opinion No. 05-03-00199-CR, delivered February 6, 2004.

Applicant was represented by the Honorable Malcolm Dade and the Honorable Maridell Templeton, who were counsel of record at trial and by the Honorable Deborah Farris, who was counsel of record on appeal.

QUESTIONS RAISED IN APPLICATION

Applicant alleges in this Application for Writ of Habeas Corpus that he is entitled to relief for the following reason, to-wit:

1. Applicant was denied his right to effective assistance of counsel at trial.

SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On February 10, 2006 a hearing was held on Applicant's application for writ of habeas corpus. Applicant was present at said hearing and represented by counsel. At this time, information cannot be obtained from Applicant's trial attorney, the Honorable Malcolm Dade. A letter from one of Mr. Dade's treating physicians is attached hereto as Court's Exhibit No. 1. Applicant's other trial counsel, the Honorable Maridell Templeton, testified at said hearing.

2. As set forth in the appellate opinion attached hereto as Court's Exhibit No. 2, the facts of the offense committed by Applicant and his wife are horrific.

3. A partial list of the actions taken by Applicant's trial counsel on Applicant's behalf are set forth in pages twenty-nine through thirty-one of the STATE'S SUPPLEMENTAL RESPONSE TO APPLICATION FOR WRIT OF HABEAS CORPUS.

4. While this Court appreciates and respects the testimony given by Ms. Templeton during Applicant's application for writ of habeas corpus hearing, the Court finds that Applicant was not denied his right to effective assistance of counsel by either Mr. Dade or Ms. Templeton in the trial of Cause No. F01-33777-HI. *Hernandez v. State*, 998 SW2d 770 (1999). *Craig v. State*, 825 SW2d 128 (1992). *King v. State*, 649 SW2d 42 (1983). *Ex Parte Robinson*, 639 SW2d 953 (1982).

5. Applicant's allegation fails to state sufficient facts upon which relief could be granted. *Ex Parte Bates*, 640 SW2d 894 (1982). *Ex Parte Walton*, 626 SW2d 528 (1981).

6. Applicant has failed to present this Court with any constitutional questions or questions which would entitle Applicant to relief at this time. *Ex Parte Kimes*, 872 SW2d 700 (1993). *Ex Parte McWilliams*, 634 SW2d 97 (1983). *Ex Parte Coleman*, 599 SW2d 305 (1979).

7. The Court finds that Applicant has not been denied any rights guaranteed to him by the Constitution of the United States or the Constitution of the State of Texas.

8. Applicant has failed to sustain his burden of proof with regard to Applicant's allegation. *Ramirez v. State*, 916 SW2d 32 (1995). *Ex Parte Wagner*, 905 SW2d 799 (1995). *Ex Parte Barber*, 879 SW2d 889 (1994). *Ex Parte Salinas*, 660 SW2d 97 (1983). *Tonjes v. State*, 627 SW2d 814 (1982).

9. The Court finds that Applicant is lawfully restrained and confined.

10. The Court is of the opinion that the Applicant's Application for Writ of Habeas Corpus is totally without merit and recommends that the same be denied.

ORDERS OF THE COURT

In implementing the Court's Findings of Fact and Conclusions of Law, the Clerk will:

1. Prepare a transcript of all papers in this cause and transmit the Court's Findings and Order, including the judgment, sentence, indictment, docket sheets, and other exhibits and evidentiary matter filed in the trial records of this cause, to the Court of Criminal Appeals as provided by Article 11.07, V.A.C.C.P.

2. Send a copy of these Findings of Fact and Conclusions of Law, and the Order thereon, to the Applicant and his counsel by depositing same in the U.S. Mail.

SIGNED AND ENTERED THIS 14 day of July, 2006.

/s/
JUDGE

EXHIBIT 1

BAYLOR
Institute for
Rehabilitation

April 21,2006

Katherine Drew
Appellate Section
Criminal District Attorney
Frank Crowley Courts Building
133 N. Industrial Boulevard, L.B. 19
Dallas, Texas 75207-4600

Dear Ms. Drew:

Re: Malcolm Dade
DOB: [REDACTED]
SSN: [REDACTED]

I have been contacted by your office and asked to give medical information regarding Mr. Dade. He is a 71 year-old male with a history of a left basal ganglia hemorrhage causing a stroke on July 7, 2005. He received his initial inpatient rehabilitation at the Baylor Institute for Rehabilitation from July through August 26, 2005. At that time, he had right hemiparesis, aphasia, and acute confusion. At the time of his discharge, he was transferred to a skilled nursing facility in order to continue to receive rehabilitation therapies.

My partner, Dr. Susan Warden, subsequently saw him on January 12, 2006. Since that evaluation, she has left our

practice. I saw Mr. Dade in follow-up on April 10, 2006. At that time, he continued to have problems associated with his right arm and leg function, and speech difficulties.

Mr. Dade, because of the stroke he suffered, not only has difficulties in using his right arm and leg, but also has difficulties with speech. Persons with strokes affecting the left cerebral hemisphere can have difficulties with understanding written and verbal communications as well as difficulties in speaking, including problems with saying the word they intended to say (word finding difficulties,) or with saying words that are not the words they intended to say and being unable to know how to correct them (word substitutions.) Mr. Dade has difficulties both in trying to think of the word he wants to say and also in substituting incorrect words for the one he wants to say. He also does not understand everything that is written or said to him.

In addition, since the veracity of his responses cannot be ascertained, we also cannot determine the accuracy of his long and short-term memory functions. This wold prove difficult to overcome in any legal proceeding.

Obviously, if he were asked questions in a legal proceeding, it would be difficult if not impossible to ascertain whether or not the answers he gave were the intended or correct answers. This would not be because he wanted to deceive, but because the complications of his stroke would hinder his ability to appropriately and accurately participate. Undoubtedly, some of his answers may be correct as given, but others would be incorrect as given. Also, because of the difficulty in knowing whether or not he accurately understands the questions being asked, it would be impossible to determine the veracity of any answer he gave. In other words, he is not 100% reliable with regard to language functions.

Should you have additional questions regarding this information, please feel free to contact me.

Sincerely,

/s/
Milton D. Thomas, MD

Malcolm Dade

EXHIBIT 2

IN THE COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-03-00199-CR

[Filed February 6, 2004]

KENNETH RAY ATKINSON,)
Appellant)
)
v.)
)
THE STATE OF TEXAS,)
Appellee)
)

On Appeal from the Criminal District Court No. 2.
Dallas County, Texas.
Trial Court Cause No. F01-33777-HI.

Before Justices Whittington, James, and O'Neill. Opinion By Justice Whittington.

OPINION

Kenneth Ray Atkinson appeals his conviction for injury to a child. After finding appellant guilty, the jury assessed punishment at life confinement. In five points of error, appellant contends the evidence is legally and factually insufficient to support his conviction and the trial judge abused his discretion in excluding certain evidence. We affirm the trial court's judgment.

BACKGROUND

On June 11, 2001, Jeanie Rivers went to appellant's home at the Quill Run Mobile Home Park in Hutchins, Texas to use the telephone. Appellant told her his wife, Barbara, had been away for a week and that he did not know if she was coming home. Appellant told Jeanie he trusted her and was going to show her something. He walked Jeanie into the bedroom. She watched as he pulled a box away from a closet and removed some clothes that were hanging on the doorknob. When he opened the closet door, Jeanie saw a little girl, sitting naked in the closet. She was very thin and dirty. Jeanie told her husband, Joe, who notified the police. The girl, L.C., was removed from the home. Appellant was subsequently arrested and charged with injury to a child. Following his conviction, he filed this appeal.

LEGAL AND FACTUAL SUFFICIENCY OF THE EVIDENCE

In his third and fourth points of error, appellant challenges the legal and factual sufficiency of the evidence to support his conviction. When reviewing challenges to the legal sufficiency of the evidence, we apply well known standards. *See Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 319, 61 L. Ed. 2d 560 (1979); *Garcia v. State*, 57 S.W.3d 436, 441 (Tex. Crim. App. 2001), *cert. denied*, 537 U.S. 1195, 123 S. Ct. 1351, 154 L. Ed. 2d 1030 (2003). We view the evidence in the light most favorable to the verdict. *Turner v. State*, 805 S.W.2d 423, 427 (Tex. Crim. App. 1991). We determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Simmons v. State*, 109 S.W.3d 469, 472 (Tex. Crim. App. 2003); *Santellan v. State*, 939 S.W.2d 155, 160 (Tex. Crim. App. 1997). The jury is the sole judge of the witnesses'

credibility and the weight to be given their testimony. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000); *Bonham v. State*, 680 S.W.2d 815, 819 (Tex. Crim. App. 1984); *see* Tex. Code Crim. Proc. Ann. art. 38.04 (Vernon 1979). Thus, the factfinder is free to accept or reject any or all of the evidence presented by either side. *See Margraves v. State*, 34 S.W.3d 912, 919 (Tex. Crim. App. 2000); *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991); *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). The factfinder may draw reasonable inferences from basic to ultimate facts. *See Sanders v. State*, 119 S.W.3d 818, 820 (Tex. Crim. App. 2003); *Lacour v. State*, 8 S.W.3d 670, 671 (Tex. Crim. App. 2000).

To establish injury to a child, the State was required to show appellant intentionally or knowingly, by act or omission, caused serious bodily injury to a child. Tex. Pen. Code Ann. § 22.04(a)(1), (b) (Vernon 2003). Proof of knowledge or intent is an inference that may be drawn by the factfinder both from direct evidence and from evidence of the circumstances surrounding the act. *See Brown v. State*, 122 S.W.3d 794, 2003 Tex. Crim. App. LEXIS 910, 2003 WL 22849864, *4 (Tex. Crim. App. Dec. 3, 2003) (jury may infer intent from any facts in evidence), *petition for cert. filed*, (U.S. Jan. 27, 2004) (No. 03-1078); *Wolfe v. State*, 917 S.W.2d 270, 275 (Tex. Crim. App. 1996) (knowledge is inference drawn by trier of fact from all circumstances); *Dillon v. State*, 574 S.W.2d 92, 94-95 (Tex. Crim. App. 1978) (same). Therefore, a jury can infer knowledge or intent from the acts, conduct, and remarks of the accused and from the surrounding circumstances. *Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991); *LaPoint v. State*, 750 S.W.2d 180, 182 (Tex. Crim. App. 1986); *see Breckenridge v. State*, 40 S.W.3d 118, 128 (Tex. App.-San Antonio 2000, pet. ref'd) (jury could have inferred requisite

intent from appellant's conduct and surrounding circumstances).

In this case, the jury was instructed:

> Now, considering all the law contained in the court's charge, if you find and believe from the evidence beyond a reasonable doubt that on or about June 2, 2001, in Dallas County, Texas, [appellant], either acting alone or with another as a party to the offense, did intentionally or knowingly by act or omission cause serious bodily injury or serious mental deficiency or impairment to [L.C.], a child fourteen years of age or younger, by failing to provide adequate food or medical care to [L.C.], or by depriving [L.C.] of adequate food or medical care, or by restraining [L.C.] and preventing her from obtaining adequate food or medical care and that, at the time of the offense, [appellant] had assumed care, custody or control of [L.C.], you shall find [appellant] guilty of injury to a child as charged in the indictment.

During trial, Rivers testified she and her husband lived near appellant and Barbara at the mobile home park. They met the Atkinsons in January or February 2001. According to appellant, he and Barbara had five children; Barbara had another child, L.C., who lived with her father. Rivers was at the Atkinsons' house three to four days a week. She did not know L.C. because she did not see her there. Rivers's children spent the night at the Atkinsons' home on several occasions. On June 11, 2001, Rivers asked appellant whether he needed her to watch the children the following week while he went to a doctor's appointment. Appellant told her yes, because "it didn't look like Barbie was going to return." Rivers testified Barbara had been away about a week and that

she had been told Barbara was visiting cousins. It was then that appellant told Rivers "he trusted her [and] was going to show her something."

They walked into the Atkinsons' bedroom. Appellant moved a box and clothes from in front of the closet door. He opened the door and said, "Hey, [L.C.]." Rivers described what she saw:

> I saw a little girl naked, sitting in the closet. She had a sheet wrapped-draped around her and her legs pulled up to her chest. Her hands back, holding her up. She had ratted hair. She was skinny, very skinny. Her skin didn't shine. She had one eye that was swollen closed, stuck closed with-it was matted up with pus. The other one was trying to see as much as it could see out of the other eye. It was just-it was awful.

Rivers returned home and told her husband about L.C. He then went to the police and reported what his wife saw. While they were waiting for the police to arrive, Rivers asked appellant how long L.C. had been in the closet. He told her "a few months." When she asked why L.C. was in the closet, appellant said because "[h]er mother didn't want to deal with her." Rivers testified that her children, who were at the Atkinsons' home on a daily basis, had not seen L.C. nor did they know she existed. She described the Atkinsons as "very open with the home," allowing people to drop in at any time. Rivers testified she would stop in on a "daily basis," and the Atkinsons did not hesitate or delay in answering their door. During the four to five months before discovering L.C.'s existence, Rivers never saw any sign that she lived there.

Rivers further testified that the remaining children were not malnourished or deprived of food or medical attention.

They all appeared to be normal or fairly normal in size and weight for children of their age. Rivers testified that in late May, appellant made reference to L.C., referring to her as "ghost like," raiding the cabinets at night for something to eat. Barbara initially tried to get appellant to be quiet; then she joined the conversation, telling a story about L.C. getting up one night and being found at a neighbor's house, eating a "package of Ramon noodles." Appellant stated they had to "tie up the refrigerator" to prevent her from getting food. They said L.C. had an eating disorder because at an earlier age, she had not been fed correctly. When Rivers asked why she was with her father if he had not fed her properly, Barbara said it "was a long story" and changed the subject. Rivers testified appellant had assumed care, custody, and control of L.C. and that, at least when Barbara was absent from the home, he had access to L.C. and was the parent or the person in charge of L.C.

Captain Ryan Woolever of the Hutchins Fire Department testified he arrived at the Atkinsons' house after Joe told him about a little girl in a closet. According to Woolever, L.C. was clothed but had no shoes or socks. She was very pale and had sunken facial features. He described her a "real frail looking" and "emaciated." She appeared to be a four-year-old child, based on her size. Woolever said she smelled of urine and feces. While talking to Woolever, appellant indicated L.C. had been in the closet "a year or so" because "she had been bad."

Robert Allwardt, an investigator with the Ellis County district attorney's office, testified he was called to the Atkinsons' house that evening. He examined the closet and the closet door. The doorknob on the closet door had a functioning lock that could not be unlocked from the inside of the closet. The closet had no window. The inside had filthy,

wet bedding, assorted trash, a dirty diaper, some plastic bags, empty potato chip wrappers, and feces. When asked to describe the smell of the closet, he responded, "If you didn't have a strong stomach, it would make you sick. It was very bad." He further testified that, based on his observations of the closet and his experience testing the lock and the door, the closet was "able to restrain a child from being able to get out and have access to food or medical attention." He also testified that, when asked, L.C. told him her name and that she was two years old.

Dr. Susan Scott, a medical doctor specializing in pediatric emergency medicine and pediatric primary care, testified L.C. was admitted to Children's Medical Center and placed in her care. Dr. Scott testified:

> It was obvious upon just evaluation at that time that [L.C.] was suffering from severe malnutrition. She was very tiny. 50th percentile for what a 2 year old should be. And she was obviously older than that. She was very quiet, had a vacant look to her. Her eyes were sunken. Her hair was very thin and broken. She had very poor dentition, with multiple teeth missing. She had difficulty standing on her own and needed assistance not only to get up to a standing position but to help remain there.
>
> Her chest was very tiny. You could see every rib. You could see every vertebra down her back. Her abdomen very distended. Both arms and both legs were very, very tiny. Obviously significant muscle wasting.

Dr. Scott stated the medical records showed that when L.C. presented to the emergency room, "she was very dirty,

covered with feces, had a bad case of lice and was very withdrawn."

Dr. Scott testified at length about L.C.'s serious medical state and the lengthy process of "refeeding."[1] She explained it is extremely dangerous to just feed someone who is severely malnourished because the body has basically shut down. A malnourished person will want to eat but eating can cause a significant electrolyte shift that, in turn, can cause low blood pressure, cardiovascular rapid heart rate, and heart failure. She also explained that at the time L.C. presented to the hospital, her stomach was incapable of processing food. Because of this situation, any food consumed would stay in L.C.'s stomach, becoming a concentrated mass. To avoid serious injury to L.C., the medical staff started a large intravenous (IV) tube for feeding her. Approximately ten days after the refeeding process began, they attempted to give L.C. food. She had significantly low blood pressure and a significantly high heart rate. She was lethargic, in respiratory distress, had poor profusion, and non-detectable levels of several electrolytes. Dr. Scott explained that meant her heart was not functioning, her body could not regulate its blood pressure and heart rate, and she didn't profuse her organs. She testified this was a direct result of her being deprived of food and nutrition for a long period of time. Dr. Scott testified that the fact L.C. was in the 50th percentile of height and weight for a two-year-old child meant that "when she reached that height and weight, she quit growing. So she was

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[1] Dr. Scott also testified, "Refeeding syndrome is thankfully [something] we don't see a lot of, but the medical community initially began to describe it after World War II when we were having trouble refeeding the concentration camp victims. You also see it very frequently in areas around the world that will suffer from severe famine."

the height and weight of a 2 year old when she was 8 years old." Dr. Scott testified L.C. weighed approximately twenty-two pounds when she first saw her. She also testified that if L.C. had not received medical treatment at the time she presented, she would have died, that a reasonable person or care giver would recognize L.C. was not at the right size and weight that she should have been at eight years of age, and that a reasonable care giver would have sought medical treatment for her based on her condition.

Dr. Barry Davison testified he was L.C.'s pediatrician during the first nineteen months of her life. He testified she was a normal baby, gaining weight at appropriate intervals. He testified that the last time L.C. visited him, she was nineteen months old and weighed 22 pounds 11 ounces.

Viewed in the light most favorable to the judgment, the evidence shows: L.C. was locked in a closet at appellant's house where he lived with his wife and their other five children; she was denied proper nutrition and medical care for an extended period; she slept and lived in filth, including her own feces; at the age of eight years old, L.C. weighed approximately the same amount she weighed at the age of nineteen months; and she was severely malnourished when she arrived at Children's Medical Center. From these facts, we conclude a rational jury could infer appellant intentionally or knowingly, by act or omission, caused serious bodily injury or serious mental deficiency or impairment to L.C., by failing to provide adequate food or medical care to L.C., by depriving L.C. of adequate food or medical care, or by restraining L.C. and preventing her from obtaining adequate food or medical care and that appellant had, at the time of the offense, assumed care, custody, or control of L.C. After viewing the evidence in the light most favorable to the verdict, we conclude the evidence is legally sufficient to

support appellant's conviction for injury to a child. We overrule appellant's third point of error.

In his fourth point, appellant raises the same argument to challenge the factual sufficiency of the evidence. Giving due deference to the jury's assessment of the witnesses' credibility and resolution of evidentiary conflicts, we cannot conclude, after reviewing the evidence in this case, that the State's evidence was so uncertain, improbable, or unbelievable that it would be clearly unjust to allow the verdict to stand. *See Thompson v. State*, 93 S.W.3d 16, 21 (Tex. Crim. App. 2001), *cert. denied*, 124 S. Ct. 250, 157 L. Ed. 2d 179 (2003); *Scott v. State*, 934 S.W.2d 396, 398-99 (Tex. App.-Dallas 1996, no pet.). Nor can we conclude the verdict is against the great weight of the evidence so as to be clearly wrong and unjust. *See Thompson*, 93 S.W.3d at 21; *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000); *Scott*, 934 S.W.2d at 398. Therefore, we conclude the evidence is factually sufficient to support appellant's conviction. We overrule appellant's fourth point of error.

EXCLUSION AND ADMISSION OF EVIDENCE

In his first and second points of error, appellant complains the trial judge abused his discretion in excluding certain evidence. Under these points, appellant claims the trial judge should have permitted two defense witnesses, Drs. Tedford and Cook, to testify regarding appellant's state of mind at the time of the offense. In his fifth point of error, appellant claims "there is error because the jury was not allowed to hear testimony to determine whether appellant had the capacity to have acted knowingly, intentionally or by omission to cause injury to [L.C.], a child younger than 14 years of age."

We review a trial judge's decision to admit or exclude evidence under an abuse of discretion standard. *Burden v. State*, 55 S.W.3d 608, 615 (Tex. Crim. App. 2001); *Green v. State*, 934 S.W.2d 92, 101-02 (Tex. Crim. App. 1996). Absent an abuse of discretion, we do not disturb a trial judge's ruling on the admissibility of evidence. *See Wyatt v. State*, 23 S.W.3d 18, 27 (Tex. Crim. App. 2000); *Coffin v. State*, 885 S.W.2d 140, 149 (Tex. Crim. App. 1994). We view the evidence in the light most favorable to the trial judge's ruling. *See Corbin v. State*, 85 S.W.3d 272, 282 (Tex. Crim. App. 2002).

Under rule 702, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Tex. R. Evid. 702. Nevertheless, "before novel scientific evidence may be admitted under Rule 702, the proponent must persuade the trial court, by clear and convincing evidence, that the evidence is reliable and therefore relevant." *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tex. R. Evid. 401. Evidence which is not relevant is inadmissible. Tex. R. Evid. 402.

Dr. Tedford's Testimony

Appellant first sought to introduce the testimony of Dr. Tedford, a psychologist. Appellant argued Tedford's testimony was admissible to show appellant's state of mind

and "what he intended or failed to intend." The judge ruled appellant failed to establish the testimony was reliable or that it was relevant. In addition, he concluded that even if Tedford's testimony had some probative value, any probative value was substantially outweighed by the danger of unfair prejudice or confusion of the issues. On appeal, appellant argues the trial judge "erred in finding that the probative value of Dr. Tedford's testimony was substantially outweighed by the danger of unfair prejudice."

Before evidence is admitted, the proponent of the evidence has the burden to show, by clear and convincing proof, that the evidence he is proffering under rule 702 is sufficiently reliable and relevant to assist the jury in accurately understanding other evidence or in determining a fact in issue. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000). The reliability of "soft" science evidence, such as Tedford's testimony, may be established by showing that (i) the field of expertise involved is a legitimate one, (ii) the subject matter of the expert's testimony is within the scope of that field, and (iii) the expert's testimony properly relies upon or utilizes the principles involved in that field. *Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998), *overruled on other grounds by State v. Terrazas*, 4 S.W.3d 720, 727 (Tex. Crim. App. 1999).

Following a hearing outside the jury's presence, the trial judge concluded Tedford's testimony did not establish (i) the underlying scientific theory and technique Tedford relied on were accepted as valid by the relevant scientific community, (ii) Tedford's qualifications as an expert, (iii) the existence of literature supporting or rejecting the underlying scientific theory or technique, (iv) the potential rate of error for the theory or technique, (v) the availability of other experts to test or evaluate the technique, (vi) the clarity with which the

underlying scientific theory or technique can be explained, and (vii) how Tedford's opinions were reached. After reviewing Tedford's testimony, we agree. Appellant failed to establish the factors specified by the judge which relate to the three-part reliability test to be met when considering whether evidence is reliable. *See Nenno*, 970 S.W.2d at 560. Because appellant did not establish the factors, we cannot conclude the trial judge abused his discretion in ruling that appellant did not establish Tedford's testimony was reliable.

Regarding whether the testimony was relevant, Tedford testified appellant had low self-esteem, was a "wimp" and a "pushover," and tended to misconstrue the boundaries of appropriate behavior. He opined that appellant's "inaccurate perceptions of people and events are likely to lead him to erroneous conclusions and ill-advised actions." Although much of the testimony dealt with appellant's general emotional and mental state during his relationship with Barbara, Tedford's testimony did not discuss appellant's specific mental state at the time the offense was committed. Thus, we cannot conclude the judge abused his discretion in ruling the testimony was not relevant. Because the record supports the trial judge's ruling that Tedford's testimony was not relevant, it would necessarily be excluded under rule 403. *See* Tex. R. Evid. 403 ("*Although relevant*, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .") (emphasis added). We overrule appellant's first point of error.

Dr. Cook's Testimony

Appellant next argues the trial judge erred in excluding Dr. Cook's testimony. During a hearing outside the jury's presence, Cook testified at length regarding his background,

his expertise, and his assessment of appellant. Appellant offered Cook's testimony as reliable and relevant to establish appellant's state of mind and intent at the time of the offense. Following this, the trial judge sustained the State's objection and ruled Cook's testimony was inadmissible. According to the judge, Cook's testimony was speculative, unreliable, and "based on conjecture" because "a person cannot testify as to what is another person's state of mind." Appellant claims the trial judge erred.

Although appellant claims the jury should have been allowed to hear Cook's testimony to determine and assess appellant's state of mind at the time of the events and whether it was his conscious objective to cause the result in this case, we disagree. Appellant argues his situation is analogous to that contemplated in article 38.36 of the code of criminal procedure. Article 38.36 provides that:

> *In all prosecutions for murder*, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense.

Tex. Code Crim. Proc. Ann. art. 38.36(a) (Vernon Supp. 2004) (emphasis added). Appellant urges Cook's testimony was relevant and, therefore, admissible because, as in murder convictions, the testimony would have showed the condition of appellant's mind at the time of the offense. Appellant cites *Smith v. State*, 5 S.W.3d 673, 679 (Tex. Crim. App. 1999) in support of his argument.

In *Smith*, the court was called upon to address whether the court of appeals erred in holding that evidence admitted under article 38.36 did not have to meet the requirements of rules 403 and 404(b). The court concluded the lower court did err, noting that if the legislature had intended "to shield evidence admissible under Article 38.36 from Rule 404(b)'s ban . . . or Rule 403's balancing test, it would have been a simple matter for the Legislature to have said so." *Smith*, 5 S.W.3d at 679. The court noted it was "quite a serious matter . . . to read into the statute" something which was not contemplated by the legislative body. *See Smith*, 5 S.W.3d at 679.

The court's holding in *Smith* does not support appellant's argument that article 38.36 authorized Cook's testimony in this case. Article 38.36 addresses evidence only in prosecutions for murder. The legislature could have expanded article 38.36 to encompass evidence in all prosecutions but did not do so. Because the legislature specifically chose to limit the application of article 38.36 to prosecutions for murder, we decline appellant's invitation to apply it to his situation.

In his second and fifth points of error, appellant attempts to fashion a defense in which he is sane but incapable of forming the intent necessary to commit the alleged offense in this case. Appellant's stance is similar to that taken by the defendant in *Thomas v. State*, 886 S.W.2d 388, 391 (Tex. App.-Houston [1st Dist.] 1994, pet. ref'd). In *Thomas*, the First Court of Appeals noted:

> The negation of intent is absence of intent; that is an entirely different concept than the incapacity to form an intent due to severe mental disease or defect. The latter we label "insanity." Appellant has attempted to fashion a hybrid defense to criminal responsibility,

> one in which he is admittedly sane but unable to form an intent to commit a proscribed act. We do not recognize any such defense as a legal justification for criminal acts. Because there is no such defense upon which appellant can rely, his expert's testimony was not relevant to any issue before the jury. Therefore, the trial court did not err in refusing it.

Thomas, 886 S.W.2d at 391. Because there is no "diminished capacity" defense to defeat the element of mens rea during the guilt-innocence phase of trial, the trial judge did not err in excluding Cook's testimony. *See Jackson v. State*, 115 S.W.3d 326, 328 (Tex. App.-Dallas 2003, pet. filed). We overrule appellant's second and fifth points of error.

We affirm the trial court's judgment.

MARK WHITTINGTON
JUSTICE

APPENDIX C

OFFICIAL NOTICE FROM COURT
OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

Thursday, January 11, 2007
Re: Case No. WR-65,444-01
CRIMINAL DISTRICT COURT #2 W01-337
STYLE: ATKINSON, KENNETH RAY

Pursuant to Rule 79.2 (d), applicant's Motion for Reconsideration/Rehearing will not be entertained.

Louise Pearson, Clerk

ROBERT UDASHEN
2301 CEDAR SPRINGS ROAD
SUITE 400
DALLAS TX 75201

APPENDIX D

IN THE COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-03-00199-CR

[Filed February 6, 2004]

KENNETH RAY ATKINSON,)
Appellant)
)
v.)
)
THE STATE OF TEXAS,)
Appellee)

On Appeal from the Criminal District Court No. 2.
Dallas County, Texas.
Trial Court Cause No. F01-33777-HI.

Before Justices Whittington, James, and O'Neill. Opinion By Justice Whittington.

OPINION

Kenneth Ray Atkinson appeals his conviction for injury to a child. After finding appellant guilty, the jury assessed punishment at life confinement. In five points of error, appellant contends the evidence is legally and factually insufficient to support his conviction and the trial judge

abused his discretion in excluding certain evidence. We affirm the trial court's judgment.

BACKGROUND

On June 11, 2001, Jeanie Rivers went to appellant's home at the Quill Run Mobile Home Park in Hutchins, Texas to use the telephone. Appellant told her his wife, Barbara, had been away for a week and that he did not know if she was coming home. Appellant told Jeanie he trusted her and was going to show her something. He walked Jeanie into the bedroom. She watched as he pulled a box away from a closet and removed some clothes that were hanging on the doorknob. When he opened the closet door, Jeanie saw a little girl, sitting naked in the closet. She was very thin and dirty. Jeanie told her husband, Joe, who notified the police. The girl, L.C., was removed from the home. Appellant was subsequently arrested and charged with injury to a child. Following his conviction, he filed this appeal.

LEGAL AND FACTUAL SUFFICIENCY OF THE EVIDENCE

In his third and fourth points of error, appellant challenges the legal and factual sufficiency of the evidence to support his conviction. When reviewing challenges to the legal sufficiency of the evidence, we apply well known standards. *See Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 319, 61 L. Ed. 2d 560 (1979); *Garcia v. State*, 57 S.W.3d 436, 441 (Tex. Crim. App. 2001), *cert. denied*, 537 U.S. 1195, 123 S. Ct. 1351, 154 L. Ed. 2d 1030 (2003). We view the evidence in the light most favorable to the verdict. *Turner v. State*, 805 S.W.2d 423, 427 (Tex. Crim. App. 1991). We determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt.

Simmons v. State, 109 S.W.3d 469, 472 (Tex. Crim. App. 2003); *Santellan v. State*, 939 S.W.2d 155, 160 (Tex. Crim. App. 1997). The jury is the sole judge of the witnesses' credibility and the weight to be given their testimony. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000); *Bonham v. State*, 680 S.W.2d 815, 819 (Tex. Crim. App. 1984); *see* Tex. Code Crim. Proc. Ann. art. 38.04 (Vernon 1979). Thus, the factfinder is free to accept or reject any or all of the evidence presented by either side. *See Margraves v. State*, 34 S.W.3d 912, 919 (Tex. Crim. App. 2000); *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991); *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). The factfinder may draw reasonable inferences from basic to ultimate facts. *See Sanders v. State*, 119 S.W.3d 818, 820 (Tex. Crim. App. 2003); *Lacour v. State*, 8 S.W.3d 670, 671 (Tex. Crim. App. 2000).

To establish injury to a child, the State was required to show appellant intentionally or knowingly, by act or omission, caused serious bodily injury to a child. Tex. Pen. Code Ann. § 22.04(a)(1), (b) (Vernon 2003). Proof of knowledge or intent is an inference that may be drawn by the factfinder both from direct evidence and from evidence of the circumstances surrounding the act. *See Brown v. State*, 122 S.W.3d 794, 2003 Tex. Crim. App. LEXIS 910, 2003 WL 22849864, *4 (Tex. Crim. App. Dec. 3, 2003) (jury may infer intent from any facts in evidence), *petition for cert. filed*, (U.S. Jan. 27, 2004) (No. 03-1078); *Wolfe v. State*, 917 S.W.2d 270, 275 (Tex. Crim. App. 1996) (knowledge is inference drawn by trier of fact from all circumstances); *Dillon v. State*, 574 S.W.2d 92, 94-95 (Tex. Crim. App. 1978) (same). Therefore, a jury can infer knowledge or intent from the acts, conduct, and remarks of the accused and from the surrounding circumstances. *Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991); *LaPoint v. State*,

750 S.W.2d 180, 182 (Tex. Crim. App. 1986); *see Breckenridge v. State*, 40 S.W.3d 118, 128 (Tex. App.-San Antonio 2000, pet. ref'd) (jury could have inferred requisite intent from appellant's conduct and surrounding circumstances).

In this case, the jury was instructed:

> Now, considering all the law contained in the court's charge, if you find and believe from the evidence beyond a reasonable doubt that on or about June 2, 2001, in Dallas County, Texas, [appellant], either acting alone or with another as a party to the offense, did intentionally or knowingly by act or omission cause serious bodily injury or serious mental deficiency or impairment to [L.C.], a child fourteen years of age or younger, by failing to provide adequate food or medical care to [L.C.], or by depriving [L.C.] of adequate food or medical care, or by restraining [L.C.] and preventing her from obtaining adequate food or medical care and that, at the time of the offense, [appellant] had assumed care, custody or control of [L.C.], you shall find [appellant] guilty of injury to a child as charged in the indictment.

During trial, Rivers testified she and her husband lived near appellant and Barbara at the mobile home park. They met the Atkinsons in January or February 2001. According to appellant, he and Barbara had five children; Barbara had another child, L.C., who lived with her father. Rivers was at the Atkinsons' house three to four days a week. She did not know L.C. because she did not see her there. Rivers's children spent the night at the Atkinsons' home on several occasions. On June 11, 2001, Rivers asked appellant whether he needed her to watch the children the following week while

he went to a doctor's appointment. Appellant told her yes, because "it didn't look like Barbie was going to return." Rivers testified Barbara had been away about a week and that she had been told Barbara was visiting cousins. It was then that appellant told Rivers "he trusted her [and] was going to show her something."

They walked into the Atkinsons' bedroom. Appellant moved a box and clothes from in front of the closet door. He opened the door and said, "Hey, [L.C.]." Rivers described what she saw:

> I saw a little girl naked, sitting in the closet. She had a sheet wrapped-draped around her and her legs pulled up to her chest. Her hands back, holding her up. She had ratted hair. She was skinny, very skinny. Her skin didn't shine. She had one eye that was swollen closed, stuck closed with-it was matted up with pus. The other one was trying to see as much as it could see out of the other eye. It was just-it was awful.

Rivers returned home and told her husband about L.C. He then went to the police and reported what his wife saw. While they were waiting for the police to arrive, Rivers asked appellant how long L.C. had been in the closet. He told her "a few months." When she asked why L.C. was in the closet, appellant said because "[h]er mother didn't want to deal with her." Rivers testified that her children, who were at the Atkinsons' home on a daily basis, had not seen L.C. nor did they know she existed. She described the Atkinsons as "very open with the home," allowing people to drop in at any time. Rivers testified she would stop in on a "daily basis," and the Atkinsons did not hesitate or delay in answering their door. During the four to five months before discovering L.C.'s existence, Rivers never saw any sign that she lived there.

Rivers further testified that the remaining children were not malnourished or deprived of food or medical attention. They all appeared to be normal or fairly normal in size and weight for children of their age. Rivers testified that in late May, appellant made reference to L.C., referring to her as "ghost like," raiding the cabinets at night for something to eat. Barbara initially tried to get appellant to be quiet; then she joined the conversation, telling a story about L.C. getting up one night and being found at a neighbor's house, eating a "package of Ramon noodles." Appellant stated they had to "tie up the refrigerator" to prevent her from getting food. They said L.C. had an eating disorder because at an earlier age, she had not been fed correctly. When Rivers asked why she was with her father if he had not fed her properly, Barbara said it "was a long story" and changed the subject. Rivers testified appellant had assumed care, custody, and control of L.C. and that, at least when Barbara was absent from the home, he had access to L.C. and was the parent or the person in charge of L.C.

Captain Ryan Woolever of the Hutchins Fire Department testified he arrived at the Atkinsons' house after Joe told him about a little girl in a closet. According to Woolever, L.C. was clothed but had no shoes or socks. She was very pale and had sunken facial features. He described her a "real frail looking" and "emaciated." She appeared to be a four-year-old child, based on her size. Woolever said she smelled of urine and feces. While talking to Woolever, appellant indicated L.C. had been in the closet "a year or so" because "she had been bad."

Robert Allwardt, an investigator with the Ellis County district attorney's office, testified he was called to the Atkinsons' house that evening. He examined the closet and the closet door. The doorknob on the closet door had a

functioning lock that could not be unlocked from the inside of the closet. The closet had no window. The inside had filthy, wet bedding, assorted trash, a dirty diaper, some plastic bags, empty potato chip wrappers, and feces. When asked to describe the smell of the closet, he responded, "If you didn't have a strong stomach, it would make you sick. It was very bad." He further testified that, based on his observations of the closet and his experience testing the lock and the door, the closet was "able to restrain a child from being able to get out and have access to food or medical attention." He also testified that, when asked, L.C. told him her name and that she was two years old.

Dr. Susan Scott, a medical doctor specializing in pediatric emergency medicine and pediatric primary care, testified L.C. was admitted to Children's Medical Center and placed in her care. Dr. Scott testified:

> It was obvious upon just evaluation at that time that [L.C.] was suffering from severe malnutrition. She was very tiny. 50th percentile for what a 2 year old should be. And she was obviously older than that. She was very quiet, had a vacant look to her. Her eyes were sunken. Her hair was very thin and broken. She had very poor dentition, with multiple teeth missing. She had difficulty standing on her own and needed assistance not only to get up to a standing position but to help remain there.
>
> Her chest was very tiny. You could see every rib. You could see every vertebra down her back. Her abdomen very distended. Both arms and both legs were very, very tiny. Obviously significant muscle wasting.

Dr. Scott stated the medical records showed that when L.C. presented to the emergency room, "she was very dirty, covered with feces, had a bad case of lice and was very withdrawn."

Dr. Scott testified at length about L.C.'s serious medical state and the lengthy process of "refeeding."[1] She explained it is extremely dangerous to just feed someone who is severely malnourished because the body has basically shut down. A malnourished person will want to eat but eating can cause a significant electrolyte shift that, in turn, can cause low blood pressure, cardiovascular rapid heart rate, and heart failure. She also explained that at the time L.C. presented to the hospital, her stomach was incapable of processing food. Because of this situation, any food consumed would stay in L.C.'s stomach, becoming a concentrated mass. To avoid serious injury to L.C., the medical staff started a large intravenous (IV) tube for feeding her. Approximately ten days after the refeeding process began, they attempted to give L.C. food. She had significantly low blood pressure and a significantly high heart rate. She was lethargic, in respiratory distress, had poor profusion, and non-detectable levels of several electrolytes. Dr. Scott explained that meant her heart was not functioning, her body could not regulate its blood pressure and heart rate, and she didn't profuse her organs. She testified this was a direct result of her being deprived of food and nutrition for a long period of time. Dr. Scott testified that the fact L.C. was in the 50th percentile of height

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[1] Dr. Scott also testified, "Refeeding syndrome is thankfully [something] we don't see a lot of, but the medical community initially began to describe it after World War II when we were having trouble refeeding the concentration camp victims. You also see it very frequently in areas around the world that will suffer from severe famine."

and weight for a two-year-old child meant that "when she reached that height and weight, she quit growing. So she was the height and weight of a 2 year old when she was 8 years old." Dr. Scott testified L.C. weighed approximately twenty-two pounds when she first saw her. She also testified that if L.C. had not received medical treatment at the time she presented, she would have died, that a reasonable person or care giver would recognize L.C. was not at the right size and weight that she should have been at eight years of age, and that a reasonable care giver would have sought medical treatment for her based on her condition.

Dr. Barry Davison testified he was L.C.'s pediatrician during the first nineteen months of her life. He testified she was a normal baby, gaining weight at appropriate intervals. He testified that the last time L.C. visited him, she was nineteen months old and weighed 22 pounds 11 ounces.

Viewed in the light most favorable to the judgment, the evidence shows: L.C. was locked in a closet at appellant's house where he lived with his wife and their other five children; she was denied proper nutrition and medical care for an extended period; she slept and lived in filth, including her own feces; at the age of eight years old, L.C. weighed approximately the same amount she weighed at the age of nineteen months; and she was severely malnourished when she arrived at Children's Medical Center. From these facts, we conclude a rational jury could infer appellant intentionally or knowingly, by act or omission, caused serious bodily injury or serious mental deficiency or impairment to L.C., by failing to provide adequate food or medical care to L.C., by depriving L.C. of adequate food or medical care, or by restraining L.C. and preventing her from obtaining adequate food or medical care and that appellant had, at the time of the offense, assumed care, custody, or control of L.C. After

viewing the evidence in the light most favorable to the verdict, we conclude the evidence is legally sufficient to support appellant's conviction for injury to a child. We overrule appellant's third point of error.

In his fourth point, appellant raises the same argument to challenge the factual sufficiency of the evidence. Giving due deference to the jury's assessment of the witnesses' credibility and resolution of evidentiary conflicts, we cannot conclude, after reviewing the evidence in this case, that the State's evidence was so uncertain, improbable, or unbelievable that it would be clearly unjust to allow the verdict to stand. *See Thompson v. State*, 93 S.W.3d 16, 21 (Tex. Crim. App. 2001), *cert. denied*, 124 S. Ct. 250, 157 L. Ed. 2d 179 (2003); *Scott v. State*, 934 S.W.2d 396, 398-99 (Tex. App.-Dallas 1996, no pet.). Nor can we conclude the verdict is against the great weight of the evidence so as to be clearly wrong and unjust. *See Thompson*, 93 S.W.3d at 21; *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000); *Scott*, 934 S.W.2d at 398. Therefore, we conclude the evidence is factually sufficient to support appellant's conviction. We overrule appellant's fourth point of error.

EXCLUSION AND ADMISSION OF EVIDENCE

In his first and second points of error, appellant complains the trial judge abused his discretion in excluding certain evidence. Under these points, appellant claims the trial judge should have permitted two defense witnesses, Drs. Tedford and Cook, to testify regarding appellant's state of mind at the time of the offense. In his fifth point of error, appellant claims "there is error because the jury was not allowed to hear testimony to determine whether appellant had the capacity to have acted knowingly, intentionally or by omission to cause injury to [L.C.], a child younger than 14 years of age."

We review a trial judge's decision to admit or exclude evidence under an abuse of discretion standard. *Burden v. State*, 55 S.W.3d 608, 615 (Tex. Crim. App. 2001); *Green v. State*, 934 S.W.2d 92, 101-02 (Tex. Crim. App. 1996). Absent an abuse of discretion, we do not disturb a trial judge's ruling on the admissibility of evidence. *See Wyatt v. State*, 23 S.W.3d 18, 27 (Tex. Crim. App. 2000); *Coffin v. State*, 885 S.W.2d 140, 149 (Tex. Crim. App. 1994). We view the evidence in the light most favorable to the trial judge's ruling. *See Corbin v. State*, 85 S.W.3d 272, 282 (Tex. Crim. App. 2002).

Under rule 702, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Tex. R. Evid. 702. Nevertheless, "before novel scientific evidence may be admitted under Rule 702, the proponent must persuade the trial court, by clear and convincing evidence, that the evidence is reliable and therefore relevant." *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tex. R. Evid. 401. Evidence which is not relevant is inadmissible. Tex. R. Evid. 402.

Dr. Tedford's Testimony

Appellant first sought to introduce the testimony of Dr. Tedford, a psychologist. Appellant argued Tedford's testimony was admissible to show appellant's state of mind

and "what he intended or failed to intend." The judge ruled appellant failed to establish the testimony was reliable or that it was relevant. In addition, he concluded that even if Tedford's testimony had some probative value, any probative value was substantially outweighed by the danger of unfair prejudice or confusion of the issues. On appeal, appellant argues the trial judge "erred in finding that the probative value of Dr. Tedford's testimony was substantially outweighed by the danger of unfair prejudice."

Before evidence is admitted, the proponent of the evidence has the burden to show, by clear and convincing proof, that the evidence he is proffering under rule 702 is sufficiently reliable and relevant to assist the jury in accurately understanding other evidence or in determining a fact in issue. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000). The reliability of "soft" science evidence, such as Tedford's testimony, may be established by showing that (i) the field of expertise involved is a legitimate one, (ii) the subject matter of the expert's testimony is within the scope of that field, and (iii) the expert's testimony properly relies upon or utilizes the principles involved in that field. *Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998), *overruled on other grounds by State v. Terrazas*, 4 S.W.3d 720, 727 (Tex. Crim. App. 1999).

Following a hearing outside the jury's presence, the trial judge concluded Tedford's testimony did not establish (i) the underlying scientific theory and technique Tedford relied on were accepted as valid by the relevant scientific community, (ii) Tedford's qualifications as an expert, (iii) the existence of literature supporting or rejecting the underlying scientific theory or technique, (iv) the potential rate of error for the theory or technique, (v) the availability of other experts to test or evaluate the technique, (vi) the clarity with which the

underlying scientific theory or technique can be explained, and (vii) how Tedford's opinions were reached. After reviewing Tedford's testimony, we agree. Appellant failed to establish the factors specified by the judge which relate to the three-part reliability test to be met when considering whether evidence is reliable. *See Nenno*, 970 S.W.2d at 560. Because appellant did not establish the factors, we cannot conclude the trial judge abused his discretion in ruling that appellant did not establish Tedford's testimony was reliable.

Regarding whether the testimony was relevant, Tedford testified appellant had low self-esteem, was a "wimp" and a "pushover," and tended to misconstrue the boundaries of appropriate behavior. He opined that appellant's "inaccurate perceptions of people and events are likely to lead him to erroneous conclusions and ill-advised actions." Although much of the testimony dealt with appellant's general emotional and mental state during his relationship with Barbara, Tedford's testimony did not discuss appellant's specific mental state at the time the offense was committed. Thus, we cannot conclude the judge abused his discretion in ruling the testimony was not relevant. Because the record supports the trial judge's ruling that Tedford's testimony was not relevant, it would necessarily be excluded under rule 403. *See* Tex. R. Evid. 403 ("*Although relevant*, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .") (emphasis added). We overrule appellant's first point of error.

Dr. Cook's Testimony

Appellant next argues the trial judge erred in excluding Dr. Cook's testimony. During a hearing outside the jury's presence, Cook testified at length regarding his background,

his expertise, and his assessment of appellant. Appellant offered Cook's testimony as reliable and relevant to establish appellant's state of mind and intent at the time of the offense. Following this, the trial judge sustained the State's objection and ruled Cook's testimony was inadmissible. According to the judge, Cook's testimony was speculative, unreliable, and "based on conjecture" because "a person cannot testify as to what is another person's state of mind." Appellant claims the trial judge erred.

Although appellant claims the jury should have been allowed to hear Cook's testimony to determine and assess appellant's state of mind at the time of the events and whether it was his conscious objective to cause the result in this case, we disagree. Appellant argues his situation is analogous to that contemplated in article 38.36 of the code of criminal procedure. Article 38.36 provides that:

> *In all prosecutions for murder*, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense.

Tex. Code Crim. Proc. Ann. art. 38.36(a) (Vernon Supp. 2004) (emphasis added). Appellant urges Cook's testimony was relevant and, therefore, admissible because, as in murder convictions, the testimony would have showed the condition of appellant's mind at the time of the offense. Appellant cites *Smith v. State*, 5 S.W.3d 673, 679 (Tex. Crim. App. 1999) in support of his argument.

In *Smith*, the court was called upon to address whether the court of appeals erred in holding that evidence admitted under article 38.36 did not have to meet the requirements of rules 403 and 404(b). The court concluded the lower court did err, noting that if the legislature had intended "to shield evidence admissible under Article 38.36 from Rule 404(b)'s ban . . . or Rule 403's balancing test, it would have been a simple matter for the Legislature to have said so." *Smith*, 5 S.W.3d at 679. The court noted it was "quite a serious matter . . . to read into the statute" something which was not contemplated by the legislative body. *See Smith*, 5 S.W.3d at 679.

The court's holding in *Smith* does not support appellant's argument that article 38.36 authorized Cook's testimony in this case. Article 38.36 addresses evidence only in prosecutions for murder. The legislature could have expanded article 38.36 to encompass evidence in all prosecutions but did not do so. Because the legislature specifically chose to limit the application of article 38.36 to prosecutions for murder, we decline appellant's invitation to apply it to his situation.

In his second and fifth points of error, appellant attempts to fashion a defense in which he is sane but incapable of forming the intent necessary to commit the alleged offense in this case. Appellant's stance is similar to that taken by the defendant in *Thomas v. State*, 886 S.W.2d 388, 391 (Tex. App.-Houston [1st Dist.] 1994, pet. ref'd). In *Thomas*, the First Court of Appeals noted:

> The negation of intent is absence of intent; that is an entirely different concept than the incapacity to form an intent due to severe mental disease or defect. The latter we label "insanity." Appellant has attempted to fashion a hybrid defense to criminal responsibility,

> one in which he is admittedly sane but unable to form an intent to commit a proscribed act. We do not recognize any such defense as a legal justification for criminal acts. Because there is no such defense upon which appellant can rely, his expert's testimony was not relevant to any issue before the jury. Therefore, the trial court did not err in refusing it.

Thomas, 886 S.W.2d at 391. Because there is no "diminished capacity" defense to defeat the element of mens rea during the guilt-innocence phase of trial, the trial judge did not err in excluding Cook's testimony. *See Jackson v. State*, 115 S.W.3d 326, 328 (Tex. App.-Dallas 2003, pet. filed). We overrule appellant's second and fifth points of error.

We affirm the trial court's judgment.

MARK WHITTINGTON
JUSTICE

APPENDIX E

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS
AUSTIN, TEXAS

NO. WR-65,444-01

[Filed August 11, 2006]

EX PARTE	)
	)
KENNETH RAY ATKINSON	)
	)

WRIT NO. W01-33777-1(A)
IN THE CRIMINAL DISTRICT COURT
NUMBER TWO DALLAS COUNTY, TEXAS

EX PARTE	)
	)
KENNETH RAY ATKINSON	)
	)

OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW ON APPLICATION FOR WRIT OF HABEAS CORPUS

NOW COMES KENNETH ATKINSON, Applicant, and files these Objections to Findings of Fact and Conclusions of Law on Application for Writ of Habeas Corpus and would show the Court the following:

I.

On July 14, 2006, the trial court signed Findings of Fact and Conclusions of Law on Application for Writ of Habeas Corpus. In that document, the trial court recommends that the Application for. Writ of Habeas Corpus filed by Applicant be denied. This recommendation is based on flawed conclusions unsupported by the record and should be disregarded.

II.

On page 2 of the Findings of Fact and Conclusions of Law on Application for Writ of Habeas Corpus, the trial court purports to make "specific Findings of Fact and Conclusions of Law." The trial court then goes on to find that Applicant was "not denied his right to effective assistance of counsel;" that Applicant did not "state sufficient facts upon which relief could be granted;" that Applicant "failed to present this Court with any constitutional question or questions which would entitle Applicant to relief at this time;" that Applicant "has not been denied any rights guaranteed to him by the Constitution of the United States orthe Constitution of the State of Texas;" that Applicant "has failed to sustain his burden of proof with regard to Applicant's allegation;" and that "Applicant is lawfully restrained and confined." (Findings, p. 3).

These form findings are not supported by any facts. They are merely conclusory statements. The Findings do not address the specific issues raised by Applicant in his Application. Rather, it appears that the trial court simply used a boilerplate form in making findings in this case. There is no evidence that the trial court read the pleadings or paid attention to the testimony at the evidentiary hearing that was held on Applicant's Application.

III.

The Memorandum in Support of Application for Writ of Habeas Corpus and the Reply to State's Supplemental Response to Application for Writ of Habeas Corpus set out in great detail the reasons why Applicant's trial attorneys were ineffective. An evidentiary hearing was held in this case in which Maridell Templeton, one of Applicant's trial attorneys, testified that she and her co-counsel, Malcolm Dade, were ineffective. That testimony, while acknowledged by the trial court, is ignored. None of the other testimony from the evidentiary hearing is even noted much less discussed by the trial court. The testimony from the evidentiary hearing established, in no uncertain terms, that the numerous failures of Applicant's trial attorneys to object to the inadmissible and prejudicial evidence described in the Memorandum and the Reply filed by Applicant, were not the result of any type of trial strategy but were the result of ineffective assistance of counsel. The trial court apparently gave no weight to the testimony presented at the evidentiary hearing.

IV.

The trial court points to a "partial list of the actions" taken by Applicant's trial attorneys (Findings, p. 2) as if to say that because the trial attorneys did not sleep through Applicant's trial they were not ineffective. This, of course, is not the type of analysis that should be followed in order to determine whether Applicant received effective assistance from his trial lawyers. Instead, the trial court should have discussed the many things that Applicant's trial attorneys did not do. The trial court should have determined whether the many mistakes made by Applicant's trial attorneys were the type of mistakes that no reasonably competent attorney would have made. The trial court should have discussed the

prejudice Applicant suffered from these mistakes. The trial court should have explained how allowing the jury to hear unreliable testimony, hearsay testimony, speculative testimony, improperly obtained statements, etc., all without objection, was effective representation. The lack of any explanation can only be because there is no spin that can be put on the failures of Applicant's trial attorneys to make them appear reasonably competent and effective.

V.

The mistakes made by Applicant's trial attorneys and identified by Applicant in his pleadings undermine confidence in both the verdict finding Applicant guilty and the assessment of Applicant's punishment. Applicant deserves a fair trial with competent counsel. He did not get that. He also deserves a fair review of his ineffective assistance of counsel claim. He did not get that.

The trial court's findings, conclusions, and recommendation are contrary to the record and should therefore be disregarded. The Court of Criminal Appeals should conduct its own review of the pleadings and the testimony presented at the evidentiary hearing and then grant Applicant the relief requested in his Application for Writ of Habeas Corpus.

Respectfully submitted,

ROBERT N. UDASHEN, P.C.
Bar Card No. 20369600

SORRELS, UDASHEN & ANTON
2301 Cedar Springs Road
Suite 400
Dallas, Texas 75201
214-468-8100
214-468-8104 fax

Attorney for Applicant

APPENDIX F

Affidavit of Mark D. Cunningham, Ph.D, ABPP

Re: State vs. Kenneth Ray Atkinson

I, Mark D. Cunningham, Ph.D., ABPP, hereby declare:

1. I am a clinical and forensic psychologist, licensed as a psychologist in the States of Texas, Arizona, Arkansas, Colorado, Connecticut, Idaho, Indiana, Illinois, Louisiana, New Mexico, Oregon, South Carolina, and Tennessee. I am over age 21. I have personal knowledge of the facts contained in this declaration and am competent to testify about them.

2. I received a Bachelor's degree in Psychology from Abilene Christian College in 1973, a Master's degree in Psychology from Oklahoma State University in 1976, and a Ph.D. in Clinical Psychology from Oklahoma State University in 1977. I completed a one-year internship in clinical psychology at the National Naval Medical Center of Bethesda, Maryland. I subsequently served as an active duty Clinical Psychologist at the Naval Submarine Medical Center in Groton, Connecticut from 1978 to 1981. I was an assistant professor of psychology at Hardin-Simmons University in Abilene, Texas from 1981 to 1983. I have maintained a private practice in clinical and forensic psychology with offices in Texas since 1981. My curriculum vitae is attached (Attachment A).

3. I was board certified in Forensic Psychology in 1995 by the American Board of Forensic Psychology, a specialty

board of the American Board of Professional Psychology. This distinction follows a rigorous examination process and is held by approximately 200 psychologists in the United States. I have provided forensic evaluation services in over 450 eases. I have participated in extensive continuing education in the area of forensic psychology.

4. I am the first author or co-author of thirteen published or in-press peer reviewed papers in the field of forensic psychology. I am the author of two brief articles and two forensic ease reports published in a scholarly text discussing standards for forensic psychology evaluations. I am first author of a chapter (Cunningham & Goldstein, 2003) in the 12-volume Handbook of Psychology. Three papers that I co-authored are currently under review with scholarly journals.

5. I am one of several invited forensic psychologists who provide training workshops for psychologists under the auspices of the American Academy of Forensic Psychology. The American Academy of Forensic Psychology (AAFP) is an association of psychologists who are board certified by the American Board of Forensic Psychology. A primary mission of the Academy is to raise the standard of practice of psychology to the courts. Accordingly, the Academy conducts continuing education workshops on various forensic psychology applications.

6. By education, training, and experience, I am quite familiar with the professional standards for evaluation of child abuse and neglect allegations. I have testified regarding this arena of forensic assessment in U.S. military and Texas state courts, in addition to providing evaluation services in individual cases, I coordinated the large-scale investigation of students alleged to have been sexually abused by their elementary school teacher.

7. Mr. Robert N. Udashen, Esq., appellate defense counsel for Mr. Kenneth Atkinson, has requested that I review the trial testimony of Allisandra Mahoney, M.A. and Barbara Ann Rila, Ph.D. in light of applicable standards of evaluation in such cases, as well as the extent to which their methods, findings, and opinions are supported or refuted by the current state of scientific knowledge. In performing this service, I have reviewed the following records regarding this case:

Opinion in the Court of Appeals, Fifth District of Texas at Dallas, No. 05-03-00199-CR,

Kenneth Ray Atkinson v. The State of Texas, Appellee

Affidavit for search warrant

Bill of indictment against Kenneth Ray Atkinson dated June 2, 2001

Narrative, Analysis and Case Conclusion, Interview with Parent and/or Other Person

Involved, Texas Department of Protective and Regulatory Services

Interview of B.C., 06-14-01

Voluntary Statement of Aeensed: Kenneth Ray Atkinson

Psychological Evaluation of L.C. (June 19, 22, 29; July 13, 2001) by Barbara A. Rila, Ph.D.

Transcript of trial testimony of Allisandra Mahoney

Transcript of trial testimony of Barbara Arm Rila, Ph.D.

Transcript of trial testimony of Peter Stavinoha, Ph.D.

8. The facts of this case are summarized in the appellate opinion and elsewhere, and will not be repeated. The analysis that follows in no way disputes that L.C. suffered extraordinary maltreatment, nor does it minimize that this maltreatment resulted in significant physical, developmental, emotional, and cognitive damage to this little girl. Rather, my analysis focuses on whether the methodology and opinions of

Ms. Mahoney and/or Dr. Rila were reliable and scientifically sound.

9. Ms. Mahoney's findings and opinions regarding the nature and experience of physical abuse, sexual abuse, and/or other maltreatment suffered by L.C., as well as the identity of Mr. Atkinson as a major perpetrator this maltreatment, were based on her interactions with L.C. as a treating psychotherapist in play therapy. In this, Ms. Mahoney relied on a methodology that is widely viewed as inappropriate and unreliable in determining the factual reality of a child's experience of physical/sexual abuse or other victimization. Utilizing a treatment context and therapeutic relationship to evaluate the factual realities of maltreatment is at odds with the widely accepted professional standard of separating the roles of a forensic evaluator and treating clinician. Similarly, there are widely recognized problems with the accuracy of the child report and the objectivity of the mental health professional when this standard is violated.

10. Because the distinction in role between treating and forensic-evaluating mental health professionals may be better known in the mental health than legal arena, a brief explanation is provided. Everson and Faller (1994) described the delineation of roles for clinician and forensic evaluators in child custody evaluations, with conceptualizations that are common to this role-differential in other treatment vs. forensic evaluation settings by substituting "patient" or "client" for "child":

FACTORS	CLINICAL	FORENSIC
Ultimate client	Child and child's parents	Judicial system
Goal	Understanding the child's psychological state	Obtaining uncontaminated data
Role of professional	Advocate	Fact finder
Stance	Pro-child	Neutrality
Assumptions	Trustworthiness of the child	Existence of multiple hypotheses
Techniques	Therapeutic	Legally defensible

11. The factors of "Assumptions" and "Techniques" represent particularly relevant distinctions in the basis and reliability of conclusions in evaluating allegations of child maltreatment. As Kuehnle (1996) described, when providing treatment the mental health professional is focused on and accepts the subjective reality of the child. It is important only that it is the child's reality, not whether it accurately reflects actual events. The goal of therapy is to change the child's subjective reality in a manner that will allow the child to adequately function within his or her world. Accordingly, the techniques of therapy may encourage fantasy and role play, not as depictions of actual events, but as vehicles to modify the child's subjective reality. In contrast, the goal of the forensic evaluator is to act as a scientist in attempting to understand the reality-basis of the child's actual experience. The forensic evaluator is thus quite vigilant about interactions

with the child that could act to alter the accuracy of the child's recollections.

12. As further illustration of this difference in treatment and forensic evaluator roles, mental health professionals almost never conduct independent investigations into the factual bases of the experiences related to them by their psychotherapy clients. Such an attempt to independently validate the psychotherapy client's self-report would have much potential to be harmful to the treatment process. "Rather, disclosures in therapy provide a therapeutic metaphor which is useful without regard to its objective truth (Shuman et al., 1998). Or, as stated by Strasburger et al. (1997): "The process of psychotherapy is a search for meaning more than facts (p. 451).

13. In recognition of the problems broadly inherent in a mental health professional attempting to simultaneously act as a forensic evaluator and treating clinician, numerous professional organizations have strongly discouraged their members from such dual roles.

The American Psychology-Law Society and the American Board of Forensic Psychology (Committee on Ethical Guidelines for Forensic Psychologists, 1991):

> Forensic psychologists avoid providing professional services to parties in a legal proceeding with whom they have personal or professional relationships that are inconsistent with the anticipated relationship. When it is necessary to provide both evaluation and treatment services to a party in a legal proceeding (as may be the case in small forensic hospital settings or small communities), the forensic psychologist takes reasonable steps to minimize the potential negative

> effects of these circumstances on the rights of the parties, confidentiality, and the process of treatment and evaluation (p. 659).

The American Academy of Psychiatry and the Law (1995):

> A treating psychiatrist should generally avoid agreeing to be an expert witness or to perform an evaluation of his patient for legal purposes because a forensic evaluation usually requires that other people be interviewed and testimony may adversely affect the therapeutic relationship.

The Committee on Psychiatry and Law of the Group for the Advancement of Psychiatry (1991):

> While, in some areas of the country with a limited number of mental health practitioners, the therapist may have the role of forensic expert thrust upon him, ordinarily, it is wise to avoid mixing the therapeutic and forensic roles.

The American Psychological Association (1992):

> In most circumstances, psychologists avoid performing multiple and potentially conflicting roles in forensic matters.

The American Psychological Association's Guidelines for Child Custody Evaluations (1994):

> Psychologists generally avoid conducting a child custody evaluation in a case in which the psychologist served in a therapeutic role for the child or his or her

> immediate family or has had other involvement that may compromise the psychologist's objectivity.

The American Academy of Child and Adolescent Psychiatry (1990):

> ...the [forensic] evaluator and the child's or adolescent's therapist should be two different individuals. This clarifies roles and preserves confidentiality in treatment. (p. 2)

14. The concern with the treating therapist simultaneously engaging in a forensic evaluation role extends to child maltreatment allegations. The greatest concern with acting in such dual roles has been voiced regarding sexual abuse allegations, and the literature cited in the sections that follows principally addresses this particular subset of maltreatment allegations. These principles and concerns, however, are broadly applicable to other forms of child maltreatment as well. To illustrate this concern from a highly regarded text (Kuehle, 1996):

> Professionals may, at times, lose their boundaries and blend roles of evaluator and therapist. After suspicions of child sexual abuse surface, when the child does not make statements to substantiate the sexual abuse, the child may be place in "therapy" for ongoing observation. The therapy conducted with these children may actually be an extended evaluation process rather than therapy. By placing children in "therapy" for ongoing observation, the premise is that given a therapeutic environment, the child may then disclose the "secret" of sexual abuse. Unfortunately, therapy under these circumstances may not offer a neutral therapy environment. As such, suspected

victims may be read stories about children who are victims of sexual abuse. They also may be repeatedly exposed to anatomical dolls after exposure to these stories and so on. To date, we do not have empirically derived answers to the effect of this type of "therapy" on children's psyches or their disclosure of sexual abuse. While this type of setting could be fertile ground for the child to disclose sexual abuse, it may be difficult within this context to separate the true from the false allegation. It also does not offer the child a truly therapeutic setting. Children should not be provided with therapy for sexual abuse if there is any question whether the child is or is not a victim of sexual abuse. This does not mean that the child should not be provided therapy with other treatment goals. (p. 29-30)

Some of the most intense legitimate criticisms of the interviews and evaluations conducted by mental health professionals have centered around multiple professional roles and conflict of interest roles. In cases of child sexual abuse, mental health professionals may be asked to assume forensic and therapeutic roles. These roles are separate and distinct and potentially involve a conflict of interest if simultaneously conducted during the investigative phase. (p. 31)

Mental health professionals involved in cases of child sexual abuse have not always clarified their role. In such cases, the question of neutrality versus advocacy has been appropriately raised. As discussed in Kendell-Tackett (1991), when the evaluator acts as an advocate rather than as a scientist, the evaluator may be prone to overvalue evidence that will substantiate

the abuse and ignore evidence that weakens a conclusion of abuse. (p. 31)

15. Ms. Mahoney's functional participation in this case as a simultaneous therapist and forensic evaluator has not been demonstrated to be reliable by scientific methods. It has been subjected to and rejected by peer-review in scholarly journals, scholarly texts, and professional associations. As a technique that is at odds with professional standards, it introduces a potential for error of substantial proportions. Ms. Mahoney's undertaking simultaneous roles is not recognized as valid within the relevant scientific community.

16. A separation of therapist and forensic evaluator roles, and the problems inherent when these are not separated, is inherent to the well-accepted elements of reliable sexual abuse investigation protocols that prescribe a carefully structured and controlled interview designed to support disclosure while minimizing leading, suggestion, injection of facts or suspects, or utilization of fantasy (e.g. American Professional Society on the Abuse of Children, 1996; Kuehnle, 1996; Lamb et al., 1994; Poole & Lamb, 1998; Raskin & Yuille, 1989; Yuille, Hunter, Joffe, & Zaparniuk). There is a consensus among these research-based guidelines and recommendations for conducting investigation interviews with children alleged to have been sexually abused that the following structure and sequence of steps should be adhered to: (1) develop rapport, (2) assess the child's ability to answer questions and provide details, (3) identify ground rules for the interview, (4) practice on non-sexual abuse questions, (5)introduce the sexual abuse topic beginning with open-ended questions, and (6) interview closure (Kuehnle, 2003). Obviously, if play therapy could, in fact, provide a reliable and factually accurate reenactment of the events associated with any alleged abuse; there would be little need for such care in preventing

report contamination. Play therapy (e.g. sand trays, doll play, etc.), however, is not regarded as a reliable investigatory technique. Instead, this treatment should be delayed until the investigation phase is completed, as the unintentional suggestions and leading of the therapist may become embedded in the child's memory, and/or the therapeutic process of modifying the child's subjective reality may make it more difficult to obtain factually accurate recollections.

17. In contrast to the "subjective" as opposed to "factual" reality of psychotherapy disclosures noted in Paragraphs 11 and 12 above, Ms. Mahoney testified that the behaviors that occur in play therapy are literal reenactment of external, factual reality, not simply the subjective reality of the child:

> Q: And Ms. Mahoney, how do you know that a child -just because you give him some toys and you're a therapist and you sit there with them, how do you know that they're acting out or playing and expressing some emotion or something that they've experienced versus just imagination and play?
>
> A: There's much research and statistics to show that children- what they do in play therapy session [sic] is coming from their mind, playing out what's on their mind. Play therapy has been used since 1900. Sigmund Freud used it. Therapists have used it. There's much research to prove that this is true, that it's not all imaginary play. It's playing out things that have happened to them in their life. (pp. 149-150)
>
> ---
>
> A: In the play therapy sessions, she might start out playing with paint or coloring or- or anything that she had on her mind, but quickly start exhibiting a lot of agitation and anger and fear and screaming and

> hollering and hurting and cutting and taking puppets and acting out on them and taking the baby doll and taking care of the baby doll. So when I began to see so much aggression and anger and fear, I knew she was acting out things that had happened to her. (154)
>
> ---
>
> A: ...And so she can show me those things. She can describe what it felt like, but often she cannot say where she was, how this happened, exactly what was used. So in the play therapy sessions all those things are happening. She tells me who did it, and that's how I know that these things have happened to her. (p. 164)

18. While Ms. Mahoney is correct that play therapy is a well-accepted therapeutic modality for treating emotional disorders in children, this does not mean that play therapy produces a reliable reenactment of reality. Assumptions and testimony such as that offered in this regard by Ms. Mahoney have been directly criticized in well-regarded scholarly literature. Ceci and Bruck (1995) cautioned that treating mental health professionals may misconstrue the responses of the child to the treatment being provided as evidence of sexual abuse or other maltreatment:

> It involves the danger that the use of some therapeutic techniques that are intended to help a child interpret a victimization experience (e.g. fantasy play, symbolic interpretation, visualizations), and later regain control over it (e.g., self-empowerment training), may lead to a co-construction of events and feelings that are not entirely reality based. This becomes a problem when the therapist herself testifies as to the reality of such constructions. (p. 291)

19. Ms. Mahoney's reliance on play therapy as a primary technique for discovering the factual reality as opposed to the subjective reality of a child's experience is not recognized or accepted as valid within the relevant scientific community. The forensic scholarly literature, emphasizes the subjective rather than factual reality of reports in therapy, and thus Ms. Mahoney's applications have not been subjected to peer review or gained support in forensic psychology scientific journals. It is a technique that introduces idiosyncratic and uncontrolled variables of suggestion and fantasy that have not been tested by scientific methods. There are not clear standards for the techniques and procedures of play therapy as a treatment procedure, much less as a forensic investigation technique. Accordingly, the error rate in this latter application is unknown.

20. The concerns expressed by Ceci and Bruck, as well as those acknowledged in the structured protocols for the interview of children alleged to have been sexually abused, are based on a recognition that memory in young children is not an unalterable, "photographic" process. Rather, errors may occur at the encoding, storage, and retrieval stages of memory. These processes are particularly vulnerable in children - depending on their level of development, social-emotional status, and the type and repetition of interactions that adults may have with them about the events in question.

21. Developmental factors impacting on memory capability are particularly important in this case, as L.C. was identified as so developmentally compromised that Dr. Peter Stavinoha (testifying outside the presence of the jury at the trial of Barbara Atkinson) did not believe he could perform a reliable intellectual assessment on her:

A: At that point my initial attempt was to do some formal cognitive assessments with her, but she was not able to participate in that because I felt like she was under socialized in terms of being able to do the give-and-take of a testing situation. She didn't really understand what I wanted. She was having a lot of trouble paying attention to anything. There were clear gaps in her knowledge. Her vocabulary was very inconsistent. Some words that were, you know, kind of early childhood she didn't seem to understand, and so I decided that I wouldn't do formal tests because I was fairly certain that the results would be low and not particularly useful.
(p. 157)

A: When I was looking through the range of what other people had gotten plus my interactions, I think that I was sort of thinking of her as functioning anywhere from 3 to 4, in that general range. (p. 162)

22. Dr. Barbara Rila testified similarly regarding L.C.'s developmental immaturity:

A: On initial evaluation L., as I commented earlier, was severely physically debilitated and her cognitive impairment was massive. Her ability to speak was extremely limited. The developmental assessment indicated that despite her chronological age of eight years, three months, her communication level was below that of a 3 year old child. She registered approximately age 2 years and 10 months in her ability to use language. There were similar massive delays in other areas of her functioning having to do with other mental areas, such as her ability to handle

> emotion. Her ability to experience relationships. These were also very impaired. Her ability to handle emotions was very compromised. She was a very, very damaged child, very low functioning, appeared to be mentally retarded or simply a 2 year old child, 2to 3 year old child. (pp. 191-192)

23. The developmental immaturity of L.C. has significant implications for the quality and accuracy of her memories of her experience of maltreatment. Kuehle (2003) citing Fivush and Schwartzmueller (1998) and Nelson (1993) summarized sociolinguistic theory as viewing autobiographical memory as based on the development of sophisticated language-based representational skills, which allow memories to be retained and organized around a chronological life history. The language skills necessary for autobiographical memory are thought to be incomplete until the late preschool years. The formation of autobiographical memory may also be dependent on the emergence of a sense of self, which is also developing during the preschool years (Howe & Courage, 1997). There is also a relationship between developmental status and resistance to incorporating misinformation (i.e. suggestibility), with 3-4 year olds demonstrating greater suggestibility than 6-7 year olds.

24. Given her disturbed psychological status, social-emotional factors would also be particularly important to consider in assessing the historical accuracy of L.C.'s memory. Ornstein et al. (1997) found the temperament of the child was correlated with the accuracy of memories for stressful medical procedures. Secure attachment and good parent-child communication has also been associated with resistance to suggestibility. The self-confidence of the child has been identified as inversely related to suggestibility (Kuehle, 2003). In temperament, secure attachment, good

parent-child communication, and self-confidence; L.C. would appear to be quite deficient and thus the accuracy of her memories more suspect.

25. There is extensive research on contextual factors and interviewer behaviors that may impact on the suggestibility of children and the associated accuracy of their recollections. The more developmentally immature the child, the greater the vulnerability of the child to suggestion and other memory-contaminating factors. Because play therapy is an unstructured methodology, and because the play therapy sessions of Ms. Mahoney with L.C. were apparently not videotaped, it is impossible to know how the presence of one or more of these factors may have impacted on L.C.'s verbalizations or behaviors.

26. The implicit assertions of Ms. Mahoney and Dr. Rila as they describe the play behaviors and verbal reports of L.C. regarding her maltreatment do not reflect these constructive (rather than photographic) and developmentally-related processes in understanding the "memories" of young children that predominate in the peer-reviewed literature. A non-critical view of the self-report of young children is not embraced in the relevant scientific community. Such blanket acceptance of self-report without attention to developmental status or intervening suggestion/contamination introduces a substantial potential for error. The scientific method can be utilized to evaluate the memory accuracy of young children under different conditions of suggestion and recall. Studies in this arena have demonstrated the impact of numerous variables on recall accuracy in some children, as will be summarized in a later section of this affidavit.

27. Dr. Rila's testimony was deficient in several respects. Despite Dr. Rila's identification that L.C. exhibited profound

developmental, cognitive, social, emotional, and language deficiencies at the time that she came into State custody, this did not result in any qualification or caution regarding the factual accuracy of L.C.'s "memories" of her maltreatment as reported to Dr. Rila during her second evaluation with L.C. in April 2003. Similarly, while Dr. Rila acknowledged that a recent school-based intellectual assessment of L.C. had placed her intellectual functioning in the mental retardation range (p. 192), Dr. Rila did not acknowledge that this compromised cognitive status had continuing implications for the accuracy of L.C.'s recollections and her susceptibility to suggestibility. Further, Dr. Rila did not acknowledge that the potential memory-contaminating impact of the apparent repeated investigatory interviews, therapy from Ms. Mahoney, and/or L.C.' s interactions with her foster family on factual accuracy of this very compromised little girl's reports to her during the April 2003 evaluation. Instead, Dr. Rila simply offered:

> [L.C.] recalled the events that led to her removal and characterized those along with dimensions of neglect and physical abuse and sexual abuse in interview. She ascribed those---those conducts to the people in her environment in the birth family and she presented as being very anxious, very frightened, very scared about those events and any recollection of or similar events to the frightening abusive events that had occurred. (p. 193)

28. Certainly the maltreatment suffered by L.C. negatively impacted her development. That does not represent sufficient basis, however, for a conclusion that but for this maltreatment her intellect would have been "average." While the achievement of early developmental milestones points toward development that is on a normal trajectory, the timely passing of such milestones is not a guarantee of normal intellect

and/or intact psychological functioning in middle childhood. Indeed, DSM-IV-TR (2000) described that mild mental retardation may not be noticeable in early childhood; and Durkin and Stein (1996) reported that mild mental retardation is typically not identified until school age. Routh (1996) concluded that even scores the most widely accepted standardized mental test for infants (i.e. Bayley, 1969) "did not prove to have significant long-term predictive validity" (p. 91). Thus there is not reliable scientific evidence to support Dr. Rila's conclusions, offered without qualification, in her testimony regarding the implications of these milestones:

> ...Her growth and development up to the age of eight months was on target. She was beginning to speak. She was learning to crawl. She - she did walk by one year. And when children accomplish those milestones, those small things, that means that they are going to be every at least average, normal intelligence. (p. 226)

29. While it is true that in families where one parent is battering another there is an increased risk of child abuse by either parent as well as between siblings, there is not reliable evidence to conclude that the victimized parent is more likely to engage in child abuse than the battering spouse. Quite the contrary, the battering spouse is at greater risk of inflicting violence on the children of the home as well. Accordingly, Dr. Rila was in error when she testified:

> Typically, the way families work the passive parent who is being whooped up on, so to speak, by the more dominant, aggressive parent, the passive parent would be more likely to inflict harm on the children with the kick the dog dynamic. Big cheese whoops up on the smaller one and the smaller one turns around and takes

> it out on the younger more vulnerable people in the family. That would be more typical. (pp. 211-212)

30. Were Dr. Rila's assertions correct, it would represent preferable public policy to award custody of the children of a marriage characterized by domestic violence to the abusive spouse. Obviously, such a policy would reflect neither good science nor common sense. Dr. Rila's assertions in this regard are not accepted in either the legal or psychological scientific communities.

31. Interpretation of the personality testing performed by Dr. Rila in April 2003 would be problematic in the face of the continuing marked cognitive and developmental deficits displayed by L.C. at that time:

> Her delays continued as 3 to 5 or six year delays in the areas valuated [sic]. (p. 193).

There are not reliable norms for the interpretation of the Rorschach, Children's Apperception Test, human figure drawings, house-tree-person drawing, or kinetic family drawings with a child as cognitively and developmentally compromised as L.C. Accordingly, it is not possible to make scientifically grounded interpretations of personality functioning based on L.C.'s responses to these instruments. The associated error rate is unknown.

32. Dr. Rila opined regarding L.C.'s brain growth in her testimony at the guilt phase of the trial:

> This is a time of very significant and dramatic brain growth, physical brain growth, not just learning, not just acquiring skills and knowledge. But the brain itself is growing to accommodate that learning and to

> facilitate to it. L.C. [substituted for first name], lacking the proper nutrition, medical care, stimulation and quality care, did not experience that brain growth. (195)

While Dr. Rila is broadly correct that significant brain development occurs during early childhood, and that this development is influenced by nutrition, interaction, and stimulation; such brain development is not synonymous with "brain growth." Further, assessment of brain growth would require neurological and neuro-imaging techniques that are beyond the expertise of psychologists.

33. While there are no circumstances in which the maltreatment that L.C. encountered would be benign, it cannot be concluded with certainty that such circumstances are entirely responsible for the deficits she currently exhibits. Rather, there is an important question of why L.C. was initially singled out to be a scapegoat in this family system. This may have been <u>in response</u> to her emerging developmental delays, and not the primary cause of her developmental delay. In other words, pre-existing deficits in L.C. may well have interacted with the pathology of her mother and stepfather in creating this role for her in the family. Should this be the case, the maltreatment she suffered would have aggravated L.C.'s cognitive and developmental limitations, but would not be the primary etiology of these.

34. Fortunately, few children sustain the extent of maltreatment that L.C. suffered. Accordingly, to my knowledge there are not large scale studies examining the adult outcomes of similarly deprived and compromised children in the modern era. Isolated case reports provide anecdotal perspective but are of limited generalization. Common sense identifies L.C.'s prognosis as guarded. The

air of certainty in Dr. Rila's prognostications regarding L.C.'s adult functioning, however, cannot be supported by reliable scientific data. Dr. Peter Stavinoha's projection of L.C.'s future was more measured and more reflective of the state of scientific knowledge:

> A: ...If a person is deprived of those, then it only makes sense that they're going to have potential deficits there that may be long lasting.
>
> Q: Can they also be permanent?
>
> A: Yes. (p. 168)

> Q: As far as how this - how that may impact [L:C.] in the future, do you have an opinion on that right now?
>
> A: My opinion would be that it may very well could impact her in the future, but to what degree, I don't know. (p. 168)

Dr. Rila was under an ethical obligation to proactively acknowledge the limitations of her opinion regarding this and other issues as previously outlined.

I hereby declare under the penalty of perjury of the laws of the State of Texas that the foregoing is true and correct to the best of my knowledge.

Dated this 2nd day of June, 2005 at Lewisville, Texas.

/s/_____
Mark D. Cunningham, Ph.D., ABPP
Clinical and Forensic Psychologist
Board Certified in Forensic Psychology
American Board of Professional Psychology

ACKNOWLEDGMENT

STATE OF TEXAS

COUNTY OF DENTON

Before me, Cera M. Hammond, a notary public, on this day personally appeared Mark D. Cunningham, Ph.D., ABPP, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purpose and consideration therein expressed. Given under my hand and seal of office this 2nd day of June, 2005.

SEAL /s/_____

Notary stamp of Cera M. Hammond
Notary Public, State of Texas
My Commission Expires
February 27, 2008

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Attachment A

CURRICULUM VITAE OF MARK D. CUNNINGHAM, PH.D., ABPP

EDUCATION

Undergraduate: Abilene Christian College,
Abilene, Texas
Bachelor of Arts, (May 1973)
Majors: Psychology,
Mass Communications

Graduate: Oklahoma State University,
Stillwater, Oklahoma
Master of Science (December 1976)
Doctor of Philosophy (December 1977)
Specialty: Clinical Psychology
(APA accredited)

Internship: National Naval Medical Center,
Bethesda, Maryland
(February 1977 to February 1978)
Specialty: Clinical Psychology
(APA accredited)

BOARD CERTIFICATION

Forensic Psychology (1995), American Board of Professional Psychology (ABPP)

CURRICULUM VITAE (2)

PROFESSIONAL LICENSES

Licensed Psychologist:

Arizona #3662	Arkansas #98-17P	Colorado #2305
Connecticut #846	Idaho #PSY-379	Illinois #071-006010
Indiana #20041376	Louisiana #794	New Mexico #0768
Oregon #1333	South Carolina #764	Tennessee #2255
Texas #2351		

PROFESSIONAL PRACTICE

1981 - date Clinical and Forensic Psychologist,
Private practice

1978 - 1981 Clinical Psychologist
(Lieutenant, MSC, USNR)
Naval Submarine Medical Center,
Groton, Connecticut

CURRICULUM VITAE (3)

ACADEMIC APPOINTMENTS

1981 - 1983 Assistant Professor: Psychology Department, Hardin-Simmons University, Abilene, Texas

1978 - 1980 Instructor (part-time): Psychology Department, Old Dominion University (U.S. Submarine Base Extension); Mohegan Community College, Norwich, Connecticut

1974 - 1977 Teaching Assistant: Psychology Department Oklahoma State University, Stillwater, Oklahoma

PROFESSIONAL AFFILIATIONS

Board Certified in Forensic Psychology, American Board of Professional Psychology (examiner)
Fellow, American Academy of Forensic Psychology (workshop teaching faculty)
Certificate of Professional Qualification in Psychology (CPQ)
National Register of Health Service Providers in Psychology

American Psychological Association
Texas Psychological Association
National Association of Sentencing Advocates
American Association for Correctional Psychology

CURRICULUM VITAE (4)

EDITORIAL

Ad hoc reviewer: Assessment
Behavioral Sciences & the Law
Law & Human Behavior

HONORS AND AWARDS

John Augustus Award - for outstanding contributions to the profession of sentencing advocacy, National Association of Sentencing Advocates, 2004

Al Brown Memorial Award - for outstanding achievement, NIMH Sex Therapy Training Program, Yale University School of Medicine, 1979-1981

Navy Commendation Medal - for meritorious service as a clinical psychologist, Naval Submarine Medical Center, United States Navy, 1978-1980

Magna Cum Laude - Bachelor of Arts, Abilene Christian College, 1973

SCHOLARLY PUBLICATIONS

Chapters in edited books:

Cunningham, M.D. & Goldstein, A.M. (2003). Sentencing determinations in death penalty cases (pp. 407-436). In A. Goldstein (Ed.), Forensic psychology (vol. 11 of 12). I. Weiner (Ed.), Handbook of psychology. New York: John Wiley & Sons.

CURRICULUM VITAE (5)

Cunningham, M.D. (in press). Special issues in capital sentencing. In M.A. Conroy, P. Lyons, & P. Kwartuer (Eds.), Forensic evaluations under Texas law: Selected criminal issues. To be published by the Capacity for Justice.

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CURRICULUM VITAE (7)

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Cuuningham, M.D., Reidy, T.J., & Sorensen, J.IL (2005). Is death row obsolete? A decade of mainstreaming death-sentenced inmates in Missouri. Behavioral Sciences & the Law, 23, 307-320.

Papers in edited legal journals:

Lyon, A. D. & Cunningham, M. D. *(in press)* Reason not the need: Does the lack of compelling state interest in maintaining a separate death row make it unlawful? American Journal of Criminal Law.

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Marcy, M. R., Hopkins, J. B. & Cunningham, M. D. (1978). A behavioral treatment of nocturnal enuresis, U.S. Navy Medicine, 69, 26-28.

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Cunningham, M. D. & Sorensen, J. R. *(manuscript under review)* An actuarial model for assessment of prison violence risk among high security inmates: A replication and extension.

Cunningham, M. D. & Sorensen, J. R. *(manuscript under review)* Nothing to lose? A comparative examination of prison misconduct rates among life-without-parole and other long-term high security inmates.

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